SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 541.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

1 United States District Court, Southern District of New York.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, Delaware, Lackawanna & Western Railroad Company, Delaware and Hudson Company, James H. Hustis as temporary receiver of Boston and Maine Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Mallory Steamship Company, Merchants & Miners Transportation Company, The New York Central Railroad Company, New York, New Haven & Hartford Railroad Company, Norfolk & Western Railroad Company, Ocean Steamship Company of Savannah, Old Dominion Steamship Company, Pennsylvania Railroad Company, Rutland Railroad Company, Southern Pacific Company, Southern Steamship Company, Union Pacific Railroad Company, Yazoo and Mississippi Valley Railroad Company and others, petitioners,

against

UNITED STATES OF AMERICA, RESPONDENT.

In Equity. No.

To the honorable the judges of said court:

Alaska Steamship Company, a corporation of the State of Nevada; Central of Georgia Railway Company, a corporation of
2 the State of Georgia; Clyde Steamship Company, a corporation of the State of Maine, which has its principal operating office in the city of New York, Southern District of New York; Delaware Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania; Delaware and Hudson Company, a corporation of the State of Pennsylvania; James H. Hustis as temporary receiver of the Boston and Maine Railroad Company, a corporation of the State of Maine and other States; Illinois Central Railroad Company, a corporation of the State of Illinois; Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania; Mallory Steamship Company, a corporation of the State of Maine, which has its principal operating office in the city of New York, Southern District of New York; Merchants & Miners Transportation Company, a corporation of the State of Maryland; The New York Central Railroad Company, a corporation of the State of New York and other States; New York, New Haven & Hartford Railroad Company, a corporation of the State of Connecticut and other States; Norfolk & Western Railway Company, a corporation of the State of Virginia; Ocean Steamship Company of Savannah, a corporation of the State of Georgia; Old Dominion Steamship

Company, a corporation of the State of Delaware, which has its principal operating office in the city of New York, Southern District of New York; Pennsylvania Railroad Company, a corporation of the State of Pennsylvania; Rutland Railroad Company, a corporation of the State of Vermont; Southern Pacific Company, a corporation of the State of Kentucky; Southern Steamship Company, a corporation of the State of Delaware; Union Pacific Railroad Company, a corporation of the State of Utah; and Yazoo and Mississippi Valley Railroad Company, a corporation of the
3 State of Mississippi and other States, bring this their petition, on behalf of themselves and of such other companies as have an interest and may by proper proceedings become parties hereto, against the United States of America.

And thereupon your petitioners complain and say:

I.

Your petitioners are corporations duly organized and existing under and by virtue of the laws of the several States and reside and have their principal operating offices as recited above and are of two classes, namely, common carriers by railroad and common carriers by inland waterway and sea. The rail petitioners are the owners of railroads, engaged in interstate commerce now in Federal control and operated under proclamation of the President dated December 26, 1917, and the act of Congress of March 21, 1918, entitled "An act to provide for the operation of transportation systems under Federal control, for the just compensation of their owners, and for other purposes." The water-line petitioners are engaged in water transportation under a common control, management or arrangement for a continuous carriage or shipment in connection with rail lines and certain of said water lines are also under Federal control.

II.

On May 6, 1912, the Interstate Commerce Commission promulgated an order, a copy of which is hereto annexed marked Exhibit A, instituting under its docket number 4844 a proceeding entitled "In the Matter of Bills of Lading". A copy of this order
4 was duly served upon your petitioners and each of them on or about May 8, 1912, and thereafter the Commission, having on sundry dates taken testimony in the said proceedings and received briefs and heard arguments, issued its report and order in the said proceeding, and served the same upon your petitioners April 30, 1919. Copies of the said report and order are attached hereto marked Exhibit B. The order referred to, dated March 14, 1919, has been served upon the railroad and water-line corporations, petitioners herein, and is as follows:

"It appearing, that by order made upon its own motion May 6, 1912, the Commission entered upon an investigation for the purpose

of determining whether the rules, regulations, and practices in connection with the form and substance and the issuance, transfer, and surrender of the bills of lading, the conditions contained therein, and other practices connected therewith are unjust, unreasonable, unjustly discriminatory, unduly prejudicial, or otherwise unlawful, and taking such action in connection with bills of lading as may be authorized by law to prevent further violations of the provisions of the act to regulate commerce, should any violations be disclosed by said investigation:

"It further appearing, that due notice of the said proceeding of investigation and of the matters and things therein involved has been given to and served upon the Director General of Railroads and upon all common carriers, except express companies, engaged in the transportation of property by rail or by water subject to the act to regulate commerce, and the case having been fully heard and submitted by the parties, and full investigation of all the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, in which said report it is found, as more particularly set forth therein, that carriers parties to this proceeding have been and are at the present time maintaining and enforcing rules and regulations contained in their present bills of lading, and are engaging in practices thereunder, which are unjust, unreasonable, or otherwise in violation of certain provisions of the law as more particularly set forth in the said report, which said report is hereby referred to and made a part hereof:

"And it further appearing, that the said report includes, and has appended thereto, two forms of bills of lading, referred to and designated in said report as Appendixes B and D, and that the Commission finds that the said forms of bills of lading would be just, reasonable, and lawful bills of lading to be used upon the lines of all said common carriers subject to the act to regulate commerce:

"It is ordered, that Walker D. Hines, Director General of Railroads, and all said common carriers subject to the act to regulate commerce, heretofore served with notice of this proceeding and parties thereto, be, and they are hereby, notified and required to cease and desist on or before August 8, 1919, from using their present bills of lading to the extent that the provisions and regulations contained therein are inconsistent with or different from the provisions and regulations contained in the forms of bills of lading herein referred to and designated as Appendixes B and D.

It is further ordered, that the said Walker D. Hines, Director General of Railroads, and all said carriers subject to the act to regulate commerce, heretofore served with notice of this proceeding and parties thereto, be, and they are hereby, notified and required to adopt and put in use on or before August 8, 1919, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6

of the act to regulate commerce, and thereafter to use and employ, uniformly when they issue bills of lading covering shipments, other than live stock, moving in interstate commerce, as required by and defined in section 20 of the act to regulate commerce, the said certain forms of bills of lading referred to as Appendixes B and D.

"And it is further ordered, that this order shall continue in force for a period of not less than two years from the date when it shall take effect.

"By the Commission."

The forms of bills of lading referred to in the said order and designated B and D are set forth in extenso as appendices to the report and order heretofore referred to and attached to this
6 petition as Exhibit B, all of which will more fully and at large appear upon reference thereto. Thereafter, to wit, on June 2, 1919, a petition for reargument was filed with the Interstate Commerce Commission on behalf of these petitioners and others in the form hereto attached marked Exhibit C, but the same was on June 10, 1919, overruled and denied by said Commission.

III.

By said report of April 14, 1919, and order dated March 14, 1919, the Commission has directed these petitioners and others similarly situated with them to cease and desist for a period of two years from the effective date of the order from the use of their present bills of lading and to use instead and in lieu thereof uniformly when they issue bills of lading governing shipments other than live stock moving in interstate commerce the forms of bills of lading which are in and by the said report and order prescribed. Said order provides that the prescribed bill of lading be put in effect on or before August 8, 1919, on 30 days' prior notice. By notice from the Commission received by some of the petitioners June 27, 1919, they are advised that the effective date of the order has been postponed one month.

IV.

Petitioners deny that they have been or are at the present time maintaining and enforcing rules and regulations contained in their present bills of lading, or are engaging in practices thereunder, which are unjust, unreasonable or otherwise in violation of law, as is stated in the aforesaid order to have been found by said Commission.

7 By existing tariffs the carriers offer to perform carriage under common-law liability, unmodified except by applicable statutes or, in the alternative, under liability measured and defined by the bill of lading adopted and issued in 1912 at the recommendation of the Interstate Commerce Commission. Shippers are free

to choose either liability. If the shipper chooses the liability measured by the bill of lading, the tariff charge for the transportation is approximately 10 per cent less.

V.

Petitioners are advised by counsel and therefore aver that neither the act of Congress to regulate commerce nor any other law imposes upon the petitioners the obligation to issue bills of lading in these prescribed forms.

VI.

Petitioners are also advised by counsel and therefore aver that neither the act of Congress to regulate commerce nor any other law confers upon the Interstate Commerce Commission authority to make the order referred to and quoted above in this petition.

VII.

Petitioners are further advised that in making the order aforesaid the Commission has without supporting evidence undertaken to require the elimination of current provisions in the bill of
8 lading long in use by petitioners and others, and the modification of other provisions in that bill. The provisions which are directed to be stricken out are not in conflict with any rules of law. The following are instances of action by the Commission in promulgating the domestic bill of lading without authority of law:

(a) The form of domestic bill of lading ordered by said Commission would eliminate the provision of the existing bill which exempts the carriers from liability on account of loss or damage due to riots or strikes and would limit that provision to delay as distinguished from loss through those causes. The Commission, as will be seen from the report attached as Exhibit B, says (52 I. C. C., p. 705):

"Although the matter is not brought in issue, we are not satisfied with the carrier's claim of exemption, which is included in this clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for 'delay caused by riots or strikes,' as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable."

The order strikes from the bill of lading this provision, which is not opposed to any law and as to which no evidence was offered.

(b) Section 1 and section 4 of the forms of bill of lading ordered by the Commission for domestic and export traffic require the carriers to assume carrier liability as distinguished from that of warehouseman for forty-eight hours after notice of arrival of property

at destination and also during free time and after notice of arrival and placement. No evidence was adduced tending to show
9 that forty-eight hours after notice of arrival was an unreasonably short time for continuance of carrier liability. This period of time is in excess of that required by law. The Commission's order in respect of this feature of the bill of lading is without supporting evidence and would add liability in excess of that imposed by law and tend to bring about a varying and divergent period during which liability as carrier would continue after arrival of property at destination.

(c) The order eliminates from domestic bill section 2 limiting the liability of the initial carrier to its own line except where the law provides otherwise.

(d) The Commission's order strikes from the domestic and export bills of lading the provision which terminates liability when shipments are delivered or received on private or other sidings after the cars have been detached from or attached to trains. Objections were made at the hearings to this provision of the current bill, but no evidence was produced tending to show that the provision was unreasonable. Placement of the car on a private siding should be regarded as delivery so as to end carrier liability; and the same considerations are controlling in respect of receiving property loaded on cars upon such a siding.

VIII.

The order of the Commission increases the liability which the carriers are required to assume beyond the liability which the law would establish in the absence of any limitations in the bill of lading. The Commission (see page 685 of Exhibit B) states the limit of its legal authority to prescribe for carriers the terms and conditions
10 which they shall write into their bills of lading to be "by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act."

The limitation upon the Commission's power is disregarded by the order herein in the following instances among others:

(a) In requiring both in the export and domestic bills of lading prescribed that the period during which the carriers' liability shall continue as carrier is extended to include the entire free time allowed by the tariffs.

(b) In the requirement of the concluding provision of the second paragraph of section 1 of the domestic and export bills that where carrier liability depends on negligence, burden to prove freedom from such negligence shall be on the carrier.

(c) In the requirement that the consignor shall be relieved from liability for freight charges in the situation described in the except-

ing clause of the second sentence of section 7 of the proposed export and domestic bills of lading, which sentence is as follows:

"The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges."

(d) In the elimination from the bills of lading in current use of the provision (section 9) relative to the liability of carriers
11 by water and in imposing by the first sentence of section 1 of the conditions of the proposed domestic and export bills of lading the condition that the carrier or party in possession of any of the property accepted under the bill shall be liable for any loss or damage except as subsequently provided in the bill, thus requiring the carriers to undertake carriage by water under greater liability than is prescribed by the common law and the statutes of the United States.

The order in effect overrides acts of Congress. By the limited liability act of March 3, 1851, and statutes amendatory thereof and supplemental thereto, the Harter Act of February 13, 1893, the fire statute of March 3, 1851 (R. S., sec. 4282), and the statute dealing with jewelry and other valuables (R. S., sec. 4281), Congress has fixed and determined the liability of water carriers. The Commission's order requires the carriers to contract for a higher and different liability than that fixed by the acts of Congress, leaving on the carrier, however, the burdens imposed by those statutes.

The greater liability imposed upon the water carriers by the Commission's order reacts upon the initial rail carriers on traffic for transportation in conjunction with water carriers, inasmuch as they are required to contract for greater liability than is imposed by the above-named statutes. A mere right of action that the rail carriers may have against water carriers is not compensation for the taking of their property.

IX.

The Commission's order is unlawful in attempting to require the elimination from the domestic bill of the customary provision
12 for establishing the actual value of the property at the place and time of shipment as the basis for the settlement of claims for loss or damage.

The Commission has approved the inclusion in the export bill of lading of the origin value basis for the settlement of claims and has struck that clause from the domestic bill because the Commission is of the opinion as matter of law that the provision is void by reason of conflict with the provisions of the Carmack-Cummins

amendments to section 20 of the act to regulate commerce. The Commission made this ground of law clear as the basis of its decision in stating (see p. 711 of Exhibit B) that the provision is "unlawful and void".

This origin value rule for the ascertainment of damages avoids uncertainties as to the elements to be considered and prevents any undue or unreasonable preference or advantage to any particular person or shipper.

The origin value clause does not relieve the carrier from liability for the full value of the commodity transported and does not limit the carrier's liability to a sum less than the value of the commodity. The clause fixes the time, place, and manner of arriving at the true value of the commodity.

X.

The act of Congress of March 21, 1918, by section 10, provides that carriers while under Federal control shall be subject to all laws and liabilities as common carriers under State or Federal laws, except in so far as may be inconsistent with any order of the President. The Director General of Railroads operating in Federal control certain systems of rail and water lines is a party to the Commission's order herein; but the Director General has had
13 committed to him and may exercise the reserved presidential power to make an order which would prevent the application to him of the Commission's order. The Director General will be affected by said order only in so far as he may choose to adopt it and submit the railroads under his operation thereto. The President in his message to the Congress now sitting in special session stated that the railroads under Federal control would be returned to their corporations by the end of the current year. The water lines not in Federal control and your other petitioners under Federal control, complainants herein, will be remediless, unless by injunction herein, against said order of the Interstate Commerce Commission.

XI.

The corporations whose property has been taken over in Federal control are not able to comply with the Commission's order, being out of possession of their properties or lines.

XII.

Said order of the Interstate Commerce Commission deprives your petitioners of their property without due process of law, is without lawful warrant, and is in violation of the fifth amendment to the Constitution of the United States.

XIII.

Your petitioners further show that if required to comply with said order they will be subjected to loss without means of reparation and to illegal degrees and amounts of liability.

14 In consideration whereof, for as much as your petitioners are remediless in the premises at law and relievable only in a Court of Equity, your petitioners pray that a preliminary or interlocutory order or injunction be entered restraining and suspending enforcement of said order of the Interstate Commerce Commission until final determination of this cause; and that upon the final hearing herein a decree be entered enjoining, setting aside, annulling and suspending said order and enjoining the enforcement thereof.

Your petitioners further pray that your honors will direct that a copy of this petition be forthwith served in the manner provided in acts of Congress, and your petitioners will ever pray, etc.

BURLINGHAM, VEEDER, MASTEN & FEAREY,
Solicitors for Petitioners,
27 William Street, New York City.

RAY ROOD ALLEN,
E. H. BOLES,
GEORGE F. BROWNELL,
FRANCIS I. GOWEN,
ALBERT H. HARRIS,
W. S. JENNEY,
ALEXANDER R. LAWTON,
BLEWETT LEE,
W. W. MEYER,
THEODORE W. REATH,
THADDEUS H. SWANK,
F. H. WOOD,
Of Counsel.

15 STATE OF NEW YORK,
Southern District of New York, ss:

Hugh Neill being duly sworn deposes and says that he is secretary of the Southern Pacific Company, one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

HUGH NEILL.

Sworn to before me this 27th day of June, 1919.
[SEAL.] CHARLES FRANKLIN,
Notary Public No. 120, New York County.
Commission expires March 30, 1920.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed June 27, 1919.

16 EXHIBIT A.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of May, A. D. 1912.

Charles A. Prouty,
Judson C. Clements,
Franklin K. Lane,
Edgar E. Clark,
James S. Harlan,
Charles C. McChord,
Balthasar H. Meyer,
} Commissioners.

No. 4844,

In the Matter of Bills of Lading.

It appearing that the Commission on November 21, 1904, entered its order instituting an investigation into the matter of a uniform bill of lading, in which investigation proceedings were duly had, and the Commission having duly published its recommendation of a uniform bill of lading on June 27, 1908, in 14 I. C. C. Rep., 346;

It further appearing, that complaints have been received by this Commission that carriers in certain parts of the country have neglected to adopt this uniform bill of lading and that certain of the regulations and practices in connection with the use of this form, and other forms of bills of lading in use by carriers subject to the act of Congress approved February 4, 1887, entitled "An act to regulate commerce," are unjust, unreasonable, unjustly discriminatory, unduly preferential and otherwise unlawful:

17 It is ordered, that an inquiry, to which all carriers subject to the aforementioned act are made respondents, be, and the same is hereby, instituted by this Commission on its own motion, for the purpose of determining whether the rules, regulations and practices in connection with the issuance, transfer and surrender of bills of lading, the conditions contained thereon and other practices connected therewith are unjust, unreasonable, unjustly discriminatory, unduly preferential or otherwise unlawful, and taking such action in connection with bills of lading as may be authorized by law to prevent further violations of the provision of the aforementioned statutes, should any violations be disclosed by said investigation.

It is further ordered, that a copy of this order be served upon each carrier subject to the act to regulate commerce.

By the Commission:

[SEAL.] JOHN H. MARBLE,
Secretary.

INTERSTATE COMMERCE COMMISSION.

No. 4844.
IN THE MATTER OF BILLS OF LADING.

Submitted December 7, 1918. Decided April 14, 1919.

Pursuant to an order of investigation instituted by the Commission upon its own motion and after due hearing and inquiry into the general subject of the form and substance of bills of lading, and of the practices of carriers in respect to the issuance, transfer, and surrender thereof, and upon consideration of all the facts of record and of the common law affecting bills of lading, its modification by federal statutory law, and the duties and powers of the Commission thereunder;

Held: With respect to domestic traffic moving in interstate commerce:

1. That the numerous complaints made to the Commission in the past alleging unfair and varying practices of carriers in the interpretation and application of the rules and regulations contained in their present bills of lading; the great importance of the bill of lading, not only in transportation usage, but as an assignable and negotiable instrument in commercial transactions and the uncertainties in which shippers, carriers, and other interested parties frequently find themselves involved respecting questions arising in connection with bills of lading, have made it imperative that the Commission take appropriate action for the purpose of formulating and prescribing uniform bills of lading.
2. That the Commission has authority in a proper proceeding under the law to require carriers subject to the act to regulate commerce to comply with the provisions of the law respecting the issuance of bills of lading; to file with it the rules and regulations which they write into their bills of lading; to require that uniform rules and regulations be adopted by them; and to determine what are reasonable and nondiscriminatory rules and regulations.
3. That with respect to the application of the Cummins amendment to the act to regulate commerce, property transported by carriers subject thereto may be put into three classes: (*a*) "ordinary live stock" as to which no limitation of liability whatsoever is lawful; (*b*) property, other than ordinary live stock, concerning which the carrier may upon proper authorization, obtained from the Commission, be permitted to contract for a limitation of the measure of its liability, that is, of the amount of recovery; (*c*) property, other than ordinary live stock, as to which the carrier has not obtained authorization to contract for a limitation of its liability and as to which, therefore, no limitation of liability is lawful.
4. Various findings in conformity with this interpretation of the law made in respect of the proposed rules and regulations and a form of bill of lading designated and described as Appendix B, applicable to domestic shipments moving in interstate commerce prescribed for use upon all lines subject to the act to regulate commerce;

Held: With respect to questions affecting export traffic, and with respect to those involving the issuance and use of bills of lading applicable to the transportation of shipments from a point in the United States to a point in a nonadjacent foreign country:

1. That the transportation of traffic from an inland point in the United States to a port of export, for export, is subject to all the provisions of section 1 of the act, even though the transportation to the port is performed wholly within the confines of the state in which it originates, and whether the traffic be carried on local or through bills of lading.
2. That the Cummins amendment does not apply to traffic to a nonadjacent foreign country.
3. That while the Commission's authority over bills of lading to nonadjacent foreign countries is more limited and attaches more indirectly than in case of bills covering domestic interstate traffic, or traffic to an adjacent foreign country, it nevertheless does have authority over the rules, regulations, and practices of inland carriers subject to the act to regulate commerce, when, and if, they join in through bills of lading to nonadjacent foreign countries, and it requires such rules and regulations to be published and filed.
4. A form of bill of lading which the Commission finds would be just, reasonable, and lawful to be used upon the lines of all carriers subject to the act to regulate commerce on export traffic to nonadjacent foreign countries prescribed, and referred to and designated in the report as Appendix D.

Walker D. Hines, Director General of Railroads.

R. Walton Moore for southern lines; *W. A. Colston* and *E. S. Jouett* for Louisville & Nashville Railroad Company; *Henry Wolf Biklé* for Pennsylvania Railroad Company, its affiliated lines, and Uniform Bill of Lading Committee; *A. P. Burgwin* for Pennsylvania lines west of Pittsburgh; *George F. Brownell* for uniform bill of lading committee of railroads in official classification territory, trunk line railroads, and Erie Railroad Company; *Henry G. Herbel* and *F. G. Wright* for Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company; *T. J. Norton* and *J. L. Coleman* for Atchison, Topeka & Santa Fe Railway Company; *F. A. Farnham* for New York, New Haven & Hartford Railroad Company; *Daniel H. Hayne* for certain rail and water interests south of the Ohio and east of the Mississippi rivers, and certain coastwise interests; *A. A. Hoeling, jr.*, for Southern Pacific Company, Sunset Central Companies, and Arizona Eastern Railroad Company; *Fred H. Wood* for Southern Pacific Sunset lines; *J. S. Hershey* for Atchison, Topeka & Santa Fe Railway Company and Gulf, Colorado & Santa Fe Railway Company; *G. Waterhouse* for Norfolk & Western Railway Company; *H. A. Taylor* for Erie Railroad Company and Uniform Bill of Lading Committee; *George B. Elliott* for Atlantic Coast Line Railroad Company; *James F. Wright* for Seaboard Air Line Railway Company; *William Mann* for New York Central lines; *Theodore W. Reath* for Norfolk & Western Railway Company; *Evans Brown* for Washington & Norfolk Steamboat Company; *C. H. Pearson* for Alabama Great Southern Railroad; *C. C. Wright* and *R. H. Widdicombe* for Chicago & North Western Railway Company and Western Trunk Line Committee; *R. B. Scott* for Western Trunk Line Committee and Chicago, Burlington & Quincy Railroad Com-

pany; *F. C. Baird* for Bessemer & Lake Erie Railroad Company; *George E. Wicks* for Bangor & Aroostook Railroad Company; *Allan P. Matthew* for Western Pacific Railway, and its receivers; *C. P. Northrop* and *Alex M. Bull* for Southern Railway Company; *A. H. McKnight* for Missouri, Kansas & Texas Railway Company, and its receivers; *Alexander R. Lawton, jr.*, for Central of Georgia Railway Company and Ocean Steamship Company; *O. E. Butterfield* for railroads in official classification territory; *W. S. Bronson* for Chesapeake & Ohio Railway Company; *R. F. Kelley* for Wheeling & Lake Erie Railroad Company; *George W. Towle* for Pacific Coast Steamship Company; *R. B. Scott, Fred H. Wood, H. M. Adams, T. J. Norton, H. A. Scandrett,* and *Charles Donnelly* for Western Classification Committee lines; *J. L. Coleman, Wallace T. Hughes, C. S. Jefferson, R. B. Scott,* and *Robert H. Widdicombe* for Western Trunk Line Committee; *W. A. Colston, J. F. Wright,* and *B. D. Bristol* as committee for southern classification carriers; *H. A. Taylor, O. E. Butterfield, F. A. Farnham, A. P. Burgwin,* and *Henry Wolf Biklé* for Official Classification Committee and Uniform Bill of Lading Committee; *H. A. Scandrett, Charles Donnelly, Fred H. Wood, H. M. Goodwood, T. J. Norton, C. S. Jefferson, W. T. Hughes,* and *R. B. Scott* for Western Classification Committee; *R. Walton Moore, Blewitt Lee, W. A. Colston, C. B. Northrop, James F. Wright, John K. Graves, A. R. Lawton, jr.,* and *Daniel H. Hayne* for Southern Classification Committee.

H. G. Wilson for Commercial Club of Kansas City, Board of Trade of Kansas City, National Industrial Traffic League, F. H. Price & Company, and others; *Herbert Sheridan* for Baltimore Chamber of Commerce; *J. H. Henderson* and *Dwight N. Lewis,* commerce counsel of Iowa, for Iowa Board of Railroad Commissioners, Farmers' Grain Dealers Association of Iowa, and others; *W. H. Chandler* for Boston Chamber of Commerce; *Alton G. Briggs* for Boston Fruit & Produce Exchange; *D. F. Hurd* for Cleveland Chamber of Commerce and National Industrial Traffic League; *A. P. Husband* for Millers' National Federation; *F. H. Price* for F. H. Price & Company, Millers' National Federation, and National Industrial Traffic League; *Jas. C. Lincoln* for Merchants' Association of New York and National Industrial Traffic League; *Thos. S. Paton* for American Bankers' Association; *Robert F. Donahue* for New York Public Service Commission, First District; *Bernard J. Rothwell* for Bay State Milling Company and Lawrenceburg Roller Mills Company; *Mark Mennel* for Harter Milling Company, Millers' National Federation, and others; *Francis B. James* and *James L. King* for Commercial Exchange of Philadelphia; *J. M. Belleville* for National Industrial Traffic League and Pittsburg Plate Glass Company; *Herbert F. Eggert* for Average Adjusters Association of the United States and Mather &

Company; *G. M. Freer* for Cincinnati Chamber of Commerce; *R. S. French*, *George W. Bond*, and *John C. Scales* for National League of Commission Merchants of the United States; *W. M. Hopkins* for National Industrial Traffic League, Bill of Lading Committee, Chicago Board of Trade, Peoria Board of Trade, and others; *N. B. Kelly* for Eastern Commercial Traffic Committee and Philadelphia Chamber of Commerce; *Russel H. Loines* for Johnson & Higgins and other marine average adjusters; *George F. Mead* for National League of Commission Merchants of the United States, Boston Fruit & Produce Exchange, and Boston Chamber of Commerce; *Edward P. Smith* for Council of Grain Exchanges and for Omaha Grain Exchange; *Arthur T. Waterfall* for Detroit Board of Commerce; *Charles J. Austin* for traffic department of the New York Produce Exchange; *Louis Brandeis* for Louisville Board of Trade; *W. T. Cornelison* for Peoria Board of Trade; *H. W. Danforth* for National Council of Farmers' Cooperative Association; *H. B. Dorsey* for Texas Grain Dealers Association and Fort Worth Grain & Cotton Exchange; *Henry T. Goemann* for Goemann Grain Exchange and Toledo Produce Exchange; *Chas. D. Jones* for Nashville Grain Exchange; *E. W. McKay* for National Lumber Manufacturers' Association; *J. C. F. Merrill*, *C. B. Pierce*, and *W. M. Hopkins* for Chicago Board of Trade; *J. L. Messmore* for St. Louis Merchants Exchange; *A. E. Reynolds* for Crablee, Reynolds & Taylor and for legislative committee Grain Dealers National Association; *Charles B. Riley* for Indiana Grain Dealers Association and Indiana Millers Association; *Frank E. Williamson* for Buffalo Chamber of Commerce; *Cassoday, Butler, Lamb & Foster* for bill of lading committee of National Industrial Traffic League, National Society of Records Association, California Fruit Growers Exchange, and others; *J. W. Craig* for Virginia Millers Association; *W. J. Evans* for National Implement & Vehicle Association of the United States; *Ernest L. Ewing* for Furniture Manufacturers' Association of Grand Rapids and Chicago Furniture Manufacturers Association; *Charles Rippin* for Merchants Exchange of St. Louis; *W. J. Ray* for National Council of Farmers' Cooperative Association and Farmers' Grain Dealers' Association of Iowa; *Geo. A. Wells* for Grain Dealers National Association; *D. G. Loomis* for New York Shippers Protective Association; *D. P. Chindbloom* for Rochester Chamber of Commerce; *C. S. Belsterling* for Carnegie Steel Company, and others; *George F. Kaufman* for Richard T. Spellman and other cattle shippers; *C. H. Cochran* and *C. L. Roos* for Millers National Federation and Washburn-Crosby Company; *F. B. Montgomery* for International Harvester Companies; *Luther M. Walter* and *John S. Burchmore* for National Industrial Traffic League and Morris & Company; *M. F. Gallagher* and *E. B. Wilkinson* for Illinois & Wis-

consin Retail Coal Dealers Association, Chicago Coal Merchants Association, National Coal Association, and others; *Lee G. Metcalf* for Grain Dealers National Association; *H. C. Barlow* for Chicago Association of Commerce; *J. S. Brown* for board of trade and city of Chicago.

Oscar F. Bell for Crane Company and National Industrial Traffic League; *E. T. Rath* for Associated Industries Central Manufacturing District; *James H. Sherman* for Wichita Board of Trade; *Ira B. Mills* and *A. L. Flinn* for Railroad and Warehouse Commission of Minnesota and St. Paul Association of Commerce; *Dwight N. Lewis* for Corn Belt Meat Producers Association and Iowa shippers of perishable products; *J. A. Ballard* for St. Louis Merchants Exchange; *W. F. Bennett* for National Poultry, Butter and Egg Industries Association; *R. D. Sangster* for Commercial Club of Kansas City, Board of Trade, Kansas City, and Kansas City Live Stock Exchange; *L. R. Martin* for Oliver Chilled Plow Works and South Bend Chamber of Commerce; *Colin C. H. Fyffe* and *Paul N. Dale* for Illinois Manufacturers' Association; *John C. Scales* for refrigerator car line committee of the National League of Commission Merchants of the United States; *C. S. Bather* for Rockford Manufacturers & Shippers Association and Federation of Furniture Manufacturers; *Martin Van Persyn* for Wholesale Grocers Exchange of Chicago and Sprague, Warner & Company; *W. S. Miles* for Peoria Board of Trade; *Charles F. Macdonald* for Duluth Commercial Club; *F. O. Paddock* for Toledo Produce Exchange; *W. P. Trickett* for Minneapolis Traffic Association; *C. A. Magnuson* for Minneapolis Chamber of Commerce and bill of lading committee of Council of Grain Exchanges; *Geo. A. Schroeder* for Chamber of Commerce of Milwaukee; *A. E. Helm* for Public Utilities Commission for the State of Kansas; *John S. Willis* for San Francisco Chamber of Commerce and Pacific Coast Traffic League; *F. A. Jones* for Arizona State Corporation Commission; *W. L. Barnum* for Arizona Cattle Growers' and Arizona Sheep Growers' associations; *Alfred A. Cohen* for San Francisco Wholesale Potato Dealers Association; *G. J. Bradley* for Merchants & Manufacturers Traffic Association of Sacramento; *H. W. Adams* for California Fruit Distributors; *W. J. Smith* and *James A. Keller* for Pacific Coast Hardware Jobbers, Pacific Hardware & Steel Company, and Baker & Hamilton; *H. F. Ardery* for California Vegetable Union; *J. A. Steward* for Mutual Orange Distributors; *A. N. Mortensen* for California Fruit Growers Exchange; *Theodore Brent* and *John A. Smith* for New Orleans Joint Traffic Bureau; *W. M. Barrow* for Railroad Commission of Louisiana; *Raymond B. Scudder* for Louisiana Sugar and Rice Exchange; *A. G. T. Moore* for Southern Pine Association; *A. J. Hunt* for Millers' National Federation, Kansas City Millers' Club, and Southwest

Millers League; *W. A. Wimbish* for Atlanta Freight Bureau; *O. L. Bunn* for Chattanooga Manufacturers Association; *J. Prince Webster* for Railroad Commission of Georgia; *A. E. Beck* for Merchants and Manufacturers Association of Baltimore; *J. Keavy* for Indianapolis Chamber of Commerce; *A. W. McLavens* for National Industrial Traffic League packing house interests; *J. S. Marvin* for National Automobile Chamber of Commerce, Incorporated; *L. Weiler* for American Railway Perishable Freight Association; *O. W. Tong* for Northern Potato Traffic Association; *Geo. S. Milnor* for Sparks Milling Company; *J. William Craig* for Shane Bros. & Wilson Company; *E. H. Ferguson* for himself and others; *Richard F. Bausman* for Washburn-Crosby Company; *Grady Cary* for Henry Knight & Son; *R. W. Lightburne* for Price-Lightburne; *R. D. Rynder* for Swift & Company; *Geo. H. Tower* for Standard Oil Company of New Jersey; *P. W. Marshall* and *Charles Brown* for A. Larsson; *W. V. Mason* for Autographic Register Company; *Frank Lyon* for Louisiana State Rice Milling Company; *James W. Sale* for Studebaker Grain & Seed Company; *T. T. Horkrader* for the American Tobacco Company; *Theo. F. Ismert* for Ismert-Hincke Milling Company; *L. L. Seamen* for Hecker-Jones-Jewell Milling Company and Duluth-Superior Milling Company; *Jos. E. Young* for Millbourne Mills, Gardner Mills, and Central Dakota Mills; *E. H. Ferguson* for certain shippers; *C. B. Heinemann* for Morris & Company; *H. K. Crafts* for Armour & Company; *E. J. Perkins* for Stewart-Warner Speedometer Corporation; *Frank G. Harsh* for Earl Brothers and others; *L. D. Rosenheimer* for Booth Fisheries Company; *M. C. Penticoff* for Montgomery-Ward & Company; *G. H. Anderson* for Manhattan Electrical Supply Company; *Perry Small* for Sparr Fruit Company and Arakelein Brothers Company; *Field Sherman* for Randolph Fruit Company; *Frank C. Epperson* for Stewart Fruit Company; *Joseph F. Zahringer* for S. Segari & Company; *M. M. Emmert* for Coca Cola Company; *George B. Elton* for the Southern Cotton Oil Company; *Frank L. Martin* for E. Nichols; *W. J. Tomkins* for Ohio Match Company; *L. W. Christensen* for Denny & Company; *E. P. Mooreherd* for Mooreherd Inspection Bureau; and *F. J. Coulter* for Western Meat Company.

REPORT OF THE COMMISSION.

WOOLLEY, *Commissioner.*

STATEMENT OF THE CASE.

This proceeding of investigation into the practices of carriers with respect to the form and substance, and the issuance, transfer, and surrender of bills of lading was instituted by the Commission upon its own motion and is, in effect, a resumption or continuation of the former proceeding in which the Commission made and published a

report, *In the Matter of Bills of Lading*, 14 I. C. C., 346. The general subject of bills of lading and of the desirability of uniform bills has been before the Commission in one form or another several times within the last few years, but notwithstanding authoritative approval by this Commission and general approval by shipping interests of the idea of a uniform bill of lading for use on lines of all carriers subject to the act to regulate commerce, efforts to secure the universal adoption and use of such an instrument have failed, so far, of the fullest measure of success, principally because the interests of some carriers, or shippers, or both, or circumstances and conditions peculiar to particular kinds of traffic, or localities, or sections of the country, have appeared to those respective interests to require special consideration in, or forms of, bills.

During the period following the enactment of the so-called Carmack amendment to the act to regulate commerce in 1906 down to the enactment of the first Cummins amendment in 1915, several cases came before the Supreme Court of the United States involving questions of interpretation and validity of conditions and provisions in bills of lading, in which the court sustained the contractual limitations of the carrier's liability. One of these was the leading case of *Adams Express Co.* v. *Croninger*, 226 U. S., 491. Following the decision in that case there was a distinct change of policy on the part of carriers, generally, in the adjustment of claims made upon them for loss, damage, or injury to property. From a former policy of compromise, of making the best terms possible with the claimant, which was not wholly disadvantageous to the claimant in many instances, and which, of course, was often discriminatory in its operation, a disposition was developed upon the part of many carriers to stand uncompromisingly upon their rights as defined in the bill of lading.

Other important decisions of the Supreme Court during this period are *Kansas Southern Ry.* v. *Carl*, 227 U. S., 639; *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S., 657, and *Boston & Maine Rd.* v. *Hooker*, 233 U. S., 97, in which latter case it was held that regulations of tariffs filed with the Commission containing provisions respecting limitations of the carrier's liability were presumed to be a part of the transportation contract, and, as such, binding upon both carrier and shipper. Perhaps the most extreme application of the doctrine was in the case of *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S., 278, in which the court held that under the law (the interpretation of the Carmack amendment being involved) a shipper of a carload of automobiles in interstate commerce who had deliberately and purposely, and with full knowledge of the limitation, and for the purpose of securing a lower rate, accepted an express

receipt limiting recovery to $50, unless a greater value was declared, could not recover more than the value stated. The effect of this decision was to hold that a limitation of liability in the bill of lading was valid even though the amount stated was purely arbitrary, the court saying, "The legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property."

A few days subsequent to the decision in the latter case Congress adopted the so-called first Cummins amendment to the act, which changed the Carmack amendment and imposed liability upon the carrier for "the full actual loss, damage, or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery," whatsoever, whether expressed in the bill of lading or otherwise. These amendments had the further effect of withdrawing from the states all regulatory authority and jurisdiction over questions of loss damage, or injury to property shipped in interstate commerce and of bringing such matters under the uniform operation and regulation of federal law.

During this period numerous complaints alleging varying and unfair practices of carriers in the interpretation and application of the rules and regulations of their bills of lading continued to be received by the Commission. The great importance of the bill of lading, not only in transportation usage but as an assignable and negotiable instrument in everyday commercial affairs and transactions, constantly became more evident, tending to accentuate the long recognized necessity for a uniform bill of lading and conformity on the part of carriers to common practices thereunder. The situation described, and the uncertainty in which shippers, carriers, and other interests frequently found themselves involved, made it imperative for the Commission to take action for the purpose of formulating and prescribing uniform bills of lading, if it should prove practicable to do so. Such action was taken through the medium of this proceeding.

The principal questions presented here, as well as in the cases coming before the courts, revolve around the efforts of the carrier in case of loss, damage, or injury to the goods transported by contract to limit its liability in accordance with the terms and conditions stated in its bills of lading.

These facts justify some general observations, elementary, even, in their character, upon the nature of the carrier's liability, and the purpose and function of bills of lading; the application of the federal statutory and the common law to them, and a brief review of this and former proceedings before the Commission touching the subject in general or in particular.

LIABILITY OF COMMON CARRIERS UNDER THE COMMON LAW.

In the celebrated case of *Coggs* v. *Bernard*, 2 Lord Raymond, 909; 1 Smith's Leading Cases, 369, Lord Holt, in quaint language, states the common-law liability of carriers as of that time to be that if "a delivery to carry or otherwise manage, * * * " is made "to one that exercises a public employment, * * * and he is to have a reward, he is bound to answer for the goods at all events. * * * The law charges this person thus intrusted to carry goods, against all events, but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of ondoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

Under the common law as it has been developed to the present day in its application to modern transportation conditions and practices, there has been little or no relaxation of the rigor of the rule of the common carrier's liability, but the exceptions have been extended to include loss, damage, and injury due to other causes, and a common carrier is now regarded as an insurer of the goods intrusted to its care and custody for transportation and as liable for all loss, damage, or injury occurring to the goods while they are held by it in its capacity of a common carrier, except when such loss, damage, or injury is caused by: (*a*) the act of God; (*b*) the public enemy; (*c*) the act of the shipper himself; (*d*) public authority; (*e*) or the inherent vice or nature of the goods. Generally a common carrier can not, under the common law, exempt itself from the consequences of its own negligence or willful act at any time or under any circumstances in the handling of goods and, therefore, even when loss is occasioned by or results from one of the excepted perils against which it is not otherwise held as an insurer, it will nevertheless be liable for any failure to use the degree of care that would have prevented or minimized losses resulting from the excepted causes. This liability of common carriers as insurers of the goods they transport is thus shown to inhere in the peculiar relationship existing between the carrier and the shipper.

The increase in the amount of business done by carriers, the extension of their operations, and the increase in the value of personal

property carried from place to place within the United Kingdom, made the degree of the carrier's liability a matter of much concern to carriers in England and they began to contrive ways of diminishing it. In the effort to achieve this end it became the custom of carriers to post notices in public places to the effect that they would not assume liability in excess of specified values for goods unless the owner should pay a higher rate in consideration thereof. It was the theory that if such a notice were brought home to the shipper in such manner that he had knowledge of it, it thereby became a part of the contract of shipment and binding upon him.

The English courts of law very early began to give official recognition to the rights claimed by common carriers to thus restrict their common-law liability and it was first held that even so lax a method as the publishing and posting in public places of notices to that intent and purpose would be sufficient to effect the limitation of the carrier's liability when such notices were brought home to the shipper.

The custom, sanctioned by law, which thus grew up in England, was productive of so many evils that in 1854 the Parliament intervened and enacted the railway and canal traffic act. After the enactment of that statute common carriers in England could limit their common-law liability only by a contract with the shipper. In this country, however, the rule was early established that a limitation of the carrier's liability could be effected only by the establishment of a contractual relationship between the carrier and shipper and that a notice of limitation of liability such as was at one time recognized by the English courts was ineffectual and could not be relied upon as a defense in an action for recovery on account of loss or damage to the goods unless the shipper first had notice of the terms and assented to them. Once assented to by the shipper a contract was assumed to be created that would be binding upon him. The form of such an assent is now commonly secured by the giving and accepting of a written bill of lading, assent on the part of the shipper being presumed even though, as is unquestionably the fact, he seldom reads and is, perhaps, actually ignorant of the conditions.

So, the law is now well settled, both in this country and in England, that a carrier may, unless forbidden by statute, limit or restrict, or even extend and enlarge, its common-law liability. Such contracts must, however, be invested with all the requirements of validity attaching to other forms of contract. Mutual assent and a valuable consideration must exist to support the assumption by the carrier of more than its common-law risks or, on the other hand, to support a restriction or limitation of those risks. A consideration for the

latter is usually found in the agreement by the carrier to apply a lower or, as it is expressed in the governing freight classifications in effect in this country, "reduced" rate; and this is a sufficient consideration.

NATURE AND FUNCTIONS OF THE BILL OF LADING.

An important function of the bill of lading is to give formal expression to the stipulations and conditions under which the carrier seeks to obtain a modification or limitation of the liability that otherwise would be imposed upon it under the common law. While the limitations of the carrier's liability must be agreed to by the shipper and the agreement be invested with the sanctity of a valid contract, neither by common law nor by federal statute in this country is any particular form of contract or solemnity of execution required. Contracts between shipper and carrier, however, are almost invariably evidenced by the more or less formal bill of lading, written or printed, which serves three distinct functions: First, a receipt for the goods; second, a contract for their carriage; and, third, documentary evidence of title to the goods. As a receipt for the goods, it recites the place and date of shipment; describes the goods, their quantity, weight, dimensions, identification marks, condition, etc., and sometimes their quality and value. As a contract, the bill names the contracting parties, specifies the rate or charge for transportation, and sets forth the agreement and stipulations with respect to the limitations of the carrier's common-law liability in the case of loss or injury to the goods and other obligations assumed by the parties or to matters agreed upon between them. That part of the bill which constitutes a receipt may be treated as distinct from the part incorporating the contractual terms. Porter, *Law of Bills of Lading*, § 14, citing *Myer* v. *Peck*, 1 Tiffany (28 N. Y.), 590, *Higgins* v. *U. S. M. S. S. Co.*, 3 Blatchf. (U. S. C. C.), 282. Ordinarily parol evidence will not be admitted to vary the terms or legal effect of a bill of lading, considered as a contract between the parties to it, although, it seems, that as a receipt for the goods it may be contradicted by oral testimony. *The Delaware*, 14 Wall., 579. It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading. The bill of lading is regarded as representative of the goods while they are in the carrier's possession. It is not a negotiable instrument in the common acceptation of the term, but it may be, and frequently is, made negotiable in form and thus becomes invested with peculiar attributes of great practical importance commercially.

LIABILITY OF COMMON CARRIERS UNDER THE FEDERAL STATUTES.

Congress has enacted several statutes in recent years which affect bills of lading in various respects. Except the Harter act, approved July 1, 1893, which applied only to carriers by water, and to which reference will be made later, the first of these was the Carmack amendment to section 20 of the act to regulate commerce, approved June 29, 1906, 34 Stat. L., 595, the material provisions of which read as follows:

> That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

Prior to the adoption of this amendment the liability of common carriers was determined by the common law or the statutes of the different states. A usual provision incorporated in bills of lading then in use was one which provided that no carrier should be liable for any loss or damage not occurring on its own line. Under this limitation an initial carrier was not liable at common law for loss or damage through the fault of the connecting carrier to whom it had, in due course, safely delivered the goods for further transportation. Each succeeding carrier was the agent of the shipper for the continuance of the transportation. The shipper, or claimant, in an action for recovery on account of loss or damage, was therefore subjected to the inconvenience of ascertaining upon which one of several lines in the through route the loss or damage occurred. This was often impossible of definite ascertainment, and, therefore, a serious handicap to the shipper in the prosecution of his suit.

The effect of the Carmack amendment was to hold the initial carrier "receiving property for transportation from a point in one state to a point in another state" as having contracted for through carriage to the point of destination, using the lines of its connecting carriers as its agents. The amendment took away from such initial carrier its former right to make a contract limiting its liability to loss or damage occurring on its own line, and thus relieved the shipping public of the burden theretofore imposed upon it of proving the particular carrier upon whose line the loss or damage occurred. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S., 186. The carrier was prohibited from mitigating or escaping the duties and liabilities

imposed upon it by the amendment by any contract, receipt, rule, or regulation which it might make, or attempt to make, with the shipper.

Prior to the decision in the *Croninger Case, supra*, there had been much conflict in the decisions, both of the federal and state courts, upon the question of validity of conditions in bills of lading which limited or sought to limit the amount of the carrier's liability for loss, damage, and injury to goods transported. The proviso in the amendment had been construed by both federal and state courts to preserve to the shipper the remedies then existing under state laws when the latter were more advantageous to him than the remedy provided by federal law, and so the rules were interpreted differently according to the jurisdiction in which the case arose. The *Croninger Case* held that it was the purpose of Congress to assume jurisdiction in the fixing of the carrier's liability upon interstate shipments, and thereafter such questions were generally construed in the light of the decision in that case, in which it was held that a contract for transportation containing a stipulation of value to which the carrier's liability was sought to be limited was valid and not in violation of the provision of the act.

On March 4, 1915, Congress enacted the first Cummins amendment, so called, which became effective June 2, 1915, 38 Stat. L., 1196. It extended the territorial application of the provisions of the Carmack amendment to the transportation of goods within the territories of the United States, the District of Columbia, or to goods exported to adjacent foreign countries, and also fixed, definitely and rigidly, the liability of the common carrier by a provision making the carrier liable for the full actual loss, damage, or injury caused by it or any of its connections to the goods transported by it, "notwithstanding any limitations of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." That amendment provided, however, for a bona fide declaration of value, which was binding upon both parties under the following conditions:

> *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law.

Notwithstanding the evident purpose of that amendment to invalidate all limitations or attempted limitations of liability of carriers for loss, damage, or injury caused by them, there was much diversity of opinion as to its effect upon rates and upon bill of lading provisions which were at the time in force and effect as published in tariffs on file with the Commission. In response to numerous and urgent requests the Commission conducted an inquiry into some phases of the subject and in its report, *The Cummins Amendment*, 33 I. C. C., 682, expressed its views, tentatively, upon some of the matters and things presented. It found that there was necessity for revision of bills of lading, live-stock contracts, and other similar contracts of carriage, as well as of the classifications and rate schedules; that bills of lading and live-stock contracts ought to be at once amended by eliminating obviously unlawful and invalid provisions, and permission was given to make such changes effective upon less than statutory notice. The expression of the Commission's views upon these matters was made with the express reservation that the questions were subject to judicial interpretation and that its views might be somewhat changed in the light of later developments and more complete information.

By the second Cummins amendment, 39 Stat. L., 441, effective August 9, 1916, the proviso of the first amendment relating to goods hidden from view by wrapping, boxing, etc., was eliminated and the following language substituted in place thereof:

> That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply. * * * to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary live stock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.

The effect of the latter amendment is to permit limitations of liability, or the amount of recovery, and the establishment and maintenance, under the prescribed conditions, of rates dependent upon

values declared in writing by the shipper, or agreed upon in writing as the released value of the property, in respect of all property except "ordinary live stock," which, as explained in the amendment, is still subject to the rigorous inhibitions against limitations of the carrier's liability contained in the first Cummins amendment. These conditions, as they affect live stock, will be discussed later in a supplemental report dealing with the live-stock contract or bill of lading.

With respect to all property other than ordinary live stock, unless the carrier shall have been or shall be expressly authorized or required by the Commission to establish and maintain rates dependent upon a written declaration or agreement as to value, the provisions of the first Cummins amendment are still applicable. That rates dependent upon value may be permitted and that the parties may be free to make declarations or agreements in respect of the value of goods, it is provided that such declarations or agreements shall have no other effect than to limit liability and recovery to an amount not exceeding the value stated and shall not be deemed to be in violation of section 10 of the act.

JURISDICTION OF THE COMMISSION.

The liability of common carriers for the loss of, or damage to, shipments rests upon definite legal principles, and the enforcement of such liability is not within the jurisdiction of the Interstate Commerce Commission. *Lost or Damaged Freight Replacement*, 43 I. C. C., 257. It can not direct the payment of a loss-and-damage claim, since the failure to pay would not be a violation of the act to regulate commerce. *Larkin Co.* v. *Erie & Western Transportation Co.*, 24 I. C. C., 645. The Commission is merely the instrument of the law. Its functions are administrative and quasi-judicial. Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act.

Section 12 of the act to regulate commerce as originally enacted, which defines the powers and authority of the Commission in broad terms provided:

> That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.

By the amendment of March 2, 1889, to this section it was provided:

And the Commission is hereby authorized and required to execute and enforce the provisions of this Act.

By amendment to section 1 of the act, effective June 18, 1910, it was made the duty of all common carriers subject to the provisions of the act "to establish, observe, and enforce just and reasonable * * * regulations and practices affecting * * * the issuance, form, and substance of * * * bills of lading."

Under the provisions of section 15 of the act, as amended June 29, 1906, and June 18, 1910, the Commission is empowered, after full hearing upon a complaint made as provided in section 13 of the act, or under an order for investigation made upon its own initiative, to determine whether any regulation or practice is unjust or unreasonable, or injustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the act and "to determine and prescribe what * * * regulation or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violations to the extent to which the Commission finds the same to exist."

Thus the Commission has power and authority under the act to determine the reasonableness of rules, regulations, and practices of the carriers, and to require them to cease and desist from the enforcement of rules and regulations, and the continuance of practices found to be unreasonable or unjustly discriminatory, or unduly prejudicial. And herein lies the Commission's power to lay hands upon the "issuance, form, and substance" of bills of lading. The act specifically requires carriers subject thereto to issue bills of lading. The Commission has undoubted authority to enforce this requirement in a proper proceeding. It can require carriers to file with it the rules and regulations which they write into their bills of lading. It can, by due process, require that uniform rules and regulations be adopted by carriers subject to its jurisdiction. It can determine whether such are, in and of themselves, or as interpreted in the practices of the carriers, reasonable and nondiscriminatory, and, if otherwise, condemn them and prescribe reasonable rules and regulations, in which event the carriers must obey.

FORMER PROCEEDINGS TO SECURE UNIFORMITY OF BILLS OF LADING.

Efforts to bring into use a uniform bill of lading were first initiated by carriers about 25 years ago, and some measure of success was attained through the adoption by carriers in central freight and trunk line association territories of forms that were substantially uniform. Action by this Commission was first taken in November, 1904, when,

acting upon numerous complaints, it instituted an inquiry into certain proposed changes in the provisions of bills of lading by carriers in official classification territory. After extended hearings the Commission, in June, 1908, issued its report *In the Matter of Bills of Lading, supra.* This report dealt only with the general merchandise bill of lading. Special bills of lading for live stock and other special kinds of property were not considered. It did not undertake even to prescribe a general merchandise form of bill of lading and order its adoption because, in its view, such an order at that time would have exceeded its authority. Moreover, the situation did not seem to demand such a positive direction. It did, however, recommend the adoption by all carriers, as a uniform bill of lading, of the merchandise form proposed by a joint committee of shippers and carriers. The form recommended was generally accepted and used by carriers in official and western classification territories, but it was not adopted to any great extent by the carriers in southern classification territory. The latter group of carriers adopted, for the most part, a modified form of the approved bill which is commonly referred to as the "revised standard bill of lading."

THE PRESENT PROCEEDING—SCOPE AND PURPOSES.

Failure of carriers thus to adopt the approved bill for universa use, the apparent necessity for such an instrument, and complaints of shippers, heretofore referred to, that certain of the regulations and practices in connection with this and other forms of bills of lading in use by carriers subject to the act were unjust, unreasonable, unjustly discrimnatory, unduly preferential, and otherwise unlawful, caused the Commission, on May 6, 1912, to enter an order upon its own motion, instituting the present inquiry. The order for the investigation expresses the object thus:

> For the purpose of determining whether the rules, regulations, and practices in connection with the issuance, transfer, and surrender of bills of lading, the conditions contained therein and other practices connected therewith are unjust, unreasonable, unjustly discrimnatory, unduly preferential, or otherwise unlawful, and taking such action in connection with bills of lading as may be authorized by law to prevent further violations of the provisions of the aforementioned statutes, should any violations be disclosed by said investigation.

In its report in *The Cummins Amendment, supra,* promulgated May 7, 1915, the Commission remarked that the general subject of bills of lading was then under investigation in the present proceeding and that matters informally presented in the hearings upon the Cummins amendment might be reserved and formally presented for determination in the present proceeding. Various questions relative to the provisions of domestic forms of bills of lading and also to

the various special forms of bills of lading used in connection with the transportation of particular kinds of traffic having arisen, and likewise many questions having been presented with reference to the Cummins amendment, the Commission, on December 30, 1915, assigned the present case for further hearings at different cities throughout the country with the particular purpose of developing information relative to those questions.

The investigation is therefore extended to include consideration, not only of the rules, regulations, and practices of carriers in connection with the forms of merchandise and special bills of lading now in use, but also to the demand for other special forms of bills of lading which it is contended by interested parties should be put into use.

During the course of these hearings it appeared that the desired end of uniformity in bills of lading might be attained, or at least advanced, through the medium of committees of representatives of carriers and shippers acting in conference among themselves and with each other. Such a plan was adopted and, after weeks of conference among themselves, the committee of counsel for the carriers submitted for consideration at a joint conference of carrier and shipper representatives three proposed uniform bills of lading in lieu of the great number and variety of forms then and now in use. These forms consisted of a so-called straight bill of lading to cover domestic merchandise shipments generally, an export bill, and a live-stock bill, and were submitted as sufficient in their judgment to provide properly for all classes of freight transported. Representatives of certain classes of shippers also submitted proposed uniform bills of lading to cover all shipments in domestic commerce and in export which were generally indorsed by shippers and shippers' organizations throughout the country, with the exception of certain shippers of perishable products and of coal. A form was also submitted on behalf of certain associations representing many of the shippers of live stock.

With the carrier and shipper forms above referred to as a basis for discussion, a joint conference under the auspices of the Commission was held in Washington between representatives of various classes of shippers and the carriers' committee. As a result of this conference many differences of opinion, manifested in the outset, in respect to many of the provisions proposed by the respective parties to be incorporated in the uniform domestic and export bills of lading, were either harmonized or brought to clearly defined issues. The forms showing the provisional conditions agreed upon and those as to which agreement could not be reached have been printed by the Commission (Appendixes A and C), and by common consent have been accepted by all parties as working models for the domestic and export bills that shall finally be recommended (Appendixes B and D)

The phraseology of the conditions as to which agreement could not be reached are printed in underscored italics and the shippers' counter proposals, where any were made, are printed in a parallel column in black-face type on the back of the form. This mechanical arrangement facilitates the reference to the phraseology and language as to which the differences of opinion still exist.

The record in the case, voluminous as it is, contains very little that can be accurately denominated "evidence" in the true acceptation of the term. Most of the testimony of witnesses and statements of the parties consist of recitals showing how existing rules and regulations operate disadvantageously and how those proposed might be expected to operate advantageously to the proponents; of expressions of opinion, and arguments as to the legal aspect of the various matters and subjects discussed. Since the points of difference between the carriers and shippers with respect to the provisions of the general merchandise domestic and export forms have thus been reduced to definite issues, it will be unnecessary to consider specifically all the proposed conditions of these bills.

From a study of the differences now existing between the carriers and shippers which have been brought to issue before us and are exhibited in Appendixes A and C as described, it will be seen that the carriers and shippers are not very far apart in respect to most of the conditions proposed to be incorporated in the domestic and export bills. Less progress was made, however, in the endeavor to reconcile differences with respect to the conditions of the live-stock bill of lading, and upon the question of the necessity, which some shippers urge exists, for the formulation and adoption of the special forms of bills of lading hitherto referred to. The progress made by the parties in their endeavors to agree upon a uniform bill of lading for domestic and export traffic makes it feasible to take up these forms for consideration first and we shall therefore discuss them by section and clause, in order, giving particular consideration to the points of disagreement between the shippers and carriers as noted on the forms exhibited in the appendixes.

FORMS OF BILLS OF LADING IN CURRENT USE.

There are many forms of bills of lading now in common use throughout the country but they may, for the purposes of this report, be reduced to three general classes, dependent upon the use of the instrument, viz: (1) The general merchandise or domestic bill of lading under which most of the general merchandise traffic of the country is transported; (2) the export bill of lading under which general merchandise traffic destined to foreign countries is moved; (3) the live-

stock contract or bill of lading. Since the latter must be dealt with in a supplemental report it will suffice for the present to confine our consideration to the two general classes first mentioned.

By the so-called Pomerene bill, or bills of lading act, approved August 29, 1916, and made effective January 1, 1917, relating to bills of lading in interstate and foreign commerce, it is provided that a bill in which it is stated that the goods are consigned to a specified person is a "straight" bill, and one in which it is stated that the goods are consigned or destined to the order of a person is an "order" bill. The primary purpose of this law is to enlarge and enhance the negotiability features of "order" bills of lading and by definitely fixing the law with respect to negotiability, and the imposition of greater responsibility upon carriers, to afford greater protection to those who in the course of commercial transaction handle and deal in such bills. The "order" bill, which is made negotiable by this law, differs from the straight bill in common usage, and from the form which we shall prescribe, only in the fact that by endorsement printed on the face of the bill it is denominated an "order" bill. The conditions printed on the back are identical and it will be unnecessary therefore in discussing the bills hereinafter to distinguish between them.

CONDITIONS OF THE PROPOSED BILLS.

The working form of the general merchandise domestic form of bill of lading, or conference form, as it may be appropriately designated because evolved as a result of conferences between the shippers' and carriers' representatives held under the auspices of the Commission, contains, under the head of "Conditions," printed on its back, 10 sections of one or more clauses each. Clauses in 5 of the sections are in controversy. The conditions of the export bill are arranged under three heads: I. Those governing the inland service to the port of export; II. Those relating to the service after arrival at the port of export and until delivery at the foreign port; III. Those relating to the service after delivery at the foreign port and until delivery at the ultimate foreign destination. We are concerned only with those conditions that have to do with the inland service to the port of export. The conditions of this part of the bill contain 11 sections. Clauses in 7 of the sections are in controversy.

In order to facilitate ready reference to the different parts of the domestic and export bills, the clauses in each section of the conference or working forms of bills have been numbered separately. These clause numbers appear in parenthesis in the forms shown in appendixes A and C and we shall hereafter refer to the conditions of the proposed bills by section and clause number.

PART 1.—THE DOMESTIC BILL OF LADING.

The uniform general merchandise bill of lading jointly proposed by the parties (Appendix A) conforms very closely, in its fundamental features, to the uniform bill of lading recommended by the Commission in its report *In the Matter of Bills of Lading, supra.*

FACE OF THE BILL.

A few minor changes are suggested, viz: (1) In the space provided on the face of the bill for the name of the consignee and destination is a parenthetical enclosure, viz, (Mail address of consignee—not for purposes of delivery). It has been suggested that the wording should read, "Mail or street address of consignee—for notification purposes only." We approve the suggestion. (2) It is suggested that at the end of the space provided for indicating the "Route" there should be inserted the words, "Delivering Carrier." We see no objection to this and therefore approve it. (3) Near the bottom on the face of the form is the following: "*Note.*—Where the rate is dependent on value, shippers are required to state specifically in writing the value of the property. The actual value of the property is hereby specifically stated by the shipper to be not exceeding ———— per ————."

As we have seen where the proper steps have not been taken to establish rates dependent upon the value, there is no provision for the effect of a declaration or agreed statement of the value in writing. The provisions against any limitation of the carrier's liability contained in the first Cummins amendment are in full force and effect. It is only where rates are lawfully made dependent upon values and the carrier's liability as to the amount of recovery limited accordingly, that the value is required to be stated. Since the Cummins amendment does not require the shipper to state the "actual" value in the latter instances, and since, with possibly a few exceptions, the value declared or agreed upon for purposes of rating or classifying the shipment would often be something less than the "full actual value" of the shipment—and this is permitted by the amendment—it is possible that the word "actual" if retained in the statement of value would not always truly represent the fact, and might prove misleading or cause misunderstanding. We think it should be stricken out and the words "agreed or declared" substituted therefor.

PROPOSED CONDITIONS.

Section 1, clause 2, differences in elevator weights.—The present uniform and revised standard forms of bills of lading contain a provision that carriers shall not be liable for "differences in the weights of

grain, seed or other commodities caused by natural shrinkage or discrepancies in elevator weights." The carriers desire to retain this provision in the proposed form. The shippers concede that the carrier is not liable for loss caused by natural shrinkage or the inherent nature of the property transported, but they propose the elimination of the words "differences in the weight of grain, seed, or other commodities caused by * * * or discrepancies in elevator weights." That a slight shrinkage in the weight of grain, relatively negligible, usually occurs under ordinary transportation conditions is a fact recognized in the trade, and allowances are made therefor in commercial transactions. No point of real difference is raised with respect to this feature and it need not be further discussed.

The circumstances out of which the controversy relative to this provision grows are best illustrated in the handling of grain shipments. When grain is received by a carrier at a country elevator for transportation to a primary grain market or other destination, or is received by a carrier at a primary market for transportation to some other market or destination, the weight given by the shipper and accepted by the carrier is ordinarily that shown by the elevator out of which the grain is loaded. This weight is inserted in the bill of lading with a condition, invariably, that it is subject to correction. Frequently, upon arrival at destination, the grain is again weighed through another elevator and a difference between the first and second elevator weights appears. Now, in such a case a difference in the weights greater than that which could result from natural shrinkage usually results from one of two causes, viz, loss in transit, or "discrepancies," i. e., variance in the weights of the different elevator scales. "Discrepancy" in the sense here used is understood to mean a difference in weights due either to error in calculating and recording the results of one or both of the weighing operations, or a difference due to mechanical imperfection in one or both of the scales, as a result of which there is failure to record a correct weight.

It is urged by those shippers who oppose the retention of this provision in the proposed bill, that it gives the carriers opportunity to decline a claim upon the ground that the alleged loss is in reality not a loss but a "discrepancy" due to a difference in elevator weights. To illustrate: A shipper loads 60,000 pounds of wheat in a car, according to weights at original point of shipment, but the carrier delivers only 59,000 pounds according to scale weights at destination. The carrier may, and does, excuse itself by quoting this clause in the bill of lading. The practical operation of the clause is to place the hazard of transportation on the shipper, whereas the liability should properly rest with the carrier. It is contended that it is no more difficult for the carrier to determine the correct elevator weights than

it is to determine the correct scale weight of loaded cars; that whether a carrier has permitted grain to be lost or stolen is a question to be determined on the facts of the particular case and that the carrier should pay for such grain as may have been lost or stolen; that the clause is in contravention of the Cummins amendment.

The testimony of shippers' representatives is that the claim departments of many carriers stand upon this provision of the bill of lading and refuse to pay claims for actual loss of grain while the same was in the carriers' possession, and that in such instances the shipper has no recourse but must pocket his loss.

The actual loss of grain in transit might, and doubtless would, be indicated by a difference between origin and destination weights, but the shippers seem to entertain the idea that *every* difference disclosed between origin and destination weights is, *ipso facto*, proof of loss of the commodity in transit. They ignore the other possible explanations of such "discrepancies."

By section 21 of the bills of lading act, reference being had to the subject of shippers' weight, load, and count, when property is loaded by the shipper, it is provided:

> Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

In Illinois the state legislature, pursuant to a mandatory constitutional provision requiring it to pass all necessary laws to give effect to one of the articles of that instrument, enacted a law requiring railroad companies to weigh carefully and correctly grain at the time it was received for shipment, to give a receipt for the true and correct amount, and to weigh out and deliver the full amount of such grain, without deduction for leakage, shrinkage, or other loss. A uniform bill of lading act, held not to be repugnant to or inconsistent with the statute first referred to, provided that a carrier might insert in a bill of lading any terms or conditions, not contrary to law or public policy, which did not impair its obligation to use reasonable care, and that such terms and conditions should be binding upon the consignor receiving such bill and making no objection in writing to such terms and conditions so far as they were not contrary to law or public policy. In an action for the loss of grain in transit brought under this statute the plaintiff recovered a judgment in a circuit court of the state which, on appeal to the supreme court of the state, was reversed because of error not relevant to the question we are here

considering. The bill of lading, however, contained a provision similar to that to which objection is here made, and the court in reference to the same said: "We regard that clause in the conditions which exempts a carrier from liability for difference in the weights of grain, seed, or other commodities caused by discrepancies in elevator weights as contrary to public policy," and further: "We assume that 'discrepancy in elevator weights' means difference between weights at the place of delivery and the place of shipment. While the railroad company is responsible for the delivery of the numbers of pounds of grain received, and its receipt in the bill of lading evidence of the quantity received, the constitutional provision was not intended to make the bill of lading an absolute policy of insurance or extend the responsibility of the carrier beyond its responsibility at common law in other respects." *Shellabarger Elevator Co.* v. *Illinois Cent. R. Co.*, 278 Ill., 333.

Under section 21 of the bills of lading act above referred to, where a shipper of bulk freight has installed and maintains adequate weighing facilities, the carrier must, upon written request, and after reasonable opportunity so to do, ascertain the kind and quantity of grain. This gives the carrier the opportunity of weighing the grain when it is shipped. The arrangement, however, does not provide a like opportunity at destination where, for instance, grain is delivered into an elevator and weighed by the elevator or consignee.

The carrier is liable, both at common law and under the federal statute, for any actual loss of goods caused by it while in transit. If a difference in weights results from actual loss of the goods so caused by it, the carrier must pay the claim for such loss. Under the law it is the carrier's duty to collect, and the shipper's duty to pay, freight charges based upon correct, not estimated, weights. The claimed loss presents a question of fact. Whether or not a "discrepancy" in elevator weights results from actual loss of the commodity or an error, human or mechanical, in the weighing operations, is a question of fact to be determined from all the evidence. The burden of proof to show what is the correct weight should depend, in a measure at least, upon which of the parties, carrier or shipper, is responsible for the accuracy of the weights.

It would appear, therefore, that the disputed provision relative to "discrepancies in elevator weights" is of no real effect in limiting the liability of the carrier and is mere surplusage. Upon brief, one of the shipper's representatives says that it—

> adds nothing to and subtracts nothing from the liability of a common carrier. Its presence, however, in the uniform bill of lading, which is filed with and becomes a part of the rate and tariff authority under section 6 of the act to regulate commerce, is mischievous in actual practice and is used as a pretense by claim agents for turning down

claims. It thus becomes a source of discord between carriers and shippers and tends to create strong prejudices in the minds of shippers against railroads and is a constant source of commercial irritation.

We are of the opinion that the words "differences in the weights of grain, seed, or other commodities caused by * * * or discrepancies in elevator weights" impart an unlawful and unreasonable meaning into bills of lading and should be stricken from the uniform bill.

Section 1, clause 3, liability of carrier as insurer and warehouseman for loss, damage, or delay caused by fire.—Three proposals of the carriers which are contained in the proposed bill relate, in whole or in part, to warehousing and storage of goods; that is, to the distinctions in the degree of the carrier's liability and obligation as an insurer of the goods on the one hand, and that of a mere bailee or warehouseman on the other after the goods have arrived at destination and are still in its possession; or while they may be held in transit upon proper request of the shipper or owner. Indeed, it is upon this important question, i. e., the degree or character of the carrier's responsibility, that the greatest conflict of interest between the shipper and carrier occurs. The shippers earnestly oppose the carriers' proposals, which are related in principle and which at the present time constitute, and for some years past have constituted, conditions in the uniform and standard bills of lading. The proposals are found in section 1, clauses 3 and 4, and section 4, clause 1, of the proposed bill, and will be considered in the order in which they appear in the proposed bill.

The first proposal, as expressed in section 1, clause 3, with respect to the carrier or party in possession of the property, is that—

for loss, damage, or delay caused by fire occuring after 48 hours (exclusive of Sundays and legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only.

At the conference between the shippers' and carriers' representatives the shippers objected to this provision and proposed in lieu thereof the following phraseology, to wit, "The liability of the carrier as a common carrier shall terminate at such time as is provided or determined by law."

Reduced to its simplest terms the question at issue here is: At what time in case of loss, damage, or injury caused by fire, shall the carrier's liability as an insurer of the goods transported by it be deemed to have ceased and its liability have been reduced to that of a warehouseman only? The answer involves some preliminary study of the carrier's liability in connection with its duty to transport and deliver. The common-law liability of the carrier attaches at the time of delivery to and acceptance by it of the goods for im-

mediate transportation. *1 Hutch. Carr.* (3d Ed.), § 112. The duty to make delivery to the consignee of the goods transported is an essential part of the carrier's obligation whether expressed in the contract or not. The question when its liability as a carrier terminates and that of warehouseman begins is an exceptionally important one and presents many delicate phases. A valid delivery involves, according to the authorities, four requisites, viz: Delivery, (*1*) to the right person, (*2*) at a reasonable time, (*3*) at the proper place, and (*4*) in a proper manner. *2 Hutch. Carr.* (3d Ed.), §§ 662–664.

The bills of lading act contains no provision respecting transition from liability of a common carrier to that of a warehouseman. Questions of this nature arising in connection with interstate shipments moving under bills of lading issued pursuant to the act to regulate commerce are necessarily federal questions and the question as to responsibility under the bill of lading is none the less a federal one because it must be resolved by the application of general principles of the common law. *Southern Ry.* v. *Prescott*, 240 U. S., 632, citing *Adams Express Co.* v. *Croninger*, *supra*.

In this country there is no uniformly accepted rule determinative of the question as to when the carrier's extraordinary liability ceases and that of a mere warehouseman is substituted, except in the case of carriers by water. The rule as to the latter is that after arrival of the goods the carrier must give the consignee actual, not constructive, notice of such arrival, and also give him a reasonable time within which to remove the goods. What constitutes a reasonable time for the removal of the goods is a question of fact, to be determined by the particular circumstances of the case. In respect of rail carriers three different rules have been evolved, familiarly known as the Massachusetts, New Hampshire, and New York rules. The latter, which has been adopted and applied in a number of states, is sometimes referred to as the Michigan rule. Under the Massachusetts rule the liability of the carrier as an insurer of the goods ends when the goods have arrived at their destination and, even without notice to the consignee, have been safely deposited upon the platform or in the warehouse of the terminal carrier. *2 Hutch. Carr.* (3d Ed.), § 701, citing *Norway Plains Co.* v. *R. R. Co.*, 1 Gray, 263. Under the New Hampshire rule carrier's liability ends when the goods have arrived at destination and a reasonable time during which they might have been removed by the consignee has elapsed. Under neither the Massachusetts nor New Hampshire rule is actual notice required. *2 Hutch. Carr.* (3d Ed.), § 704, citing *Moses* v. *The Railroad*, 32 N. H., 523. By the New York rule, if the consignee is present upon the arrival of the goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate

vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time in which to remove them. If, after a bona fide effort to give notice of the arrival of the goods to the consignee named, such consignee does not appear and remove them within a reasonable time, he can not hold the carrier longer as an insurer. If he is absent, unknown, or can not be found, the carrier may store them. *2 Hutch. Carr.* (3d Ed.), § 708, citing *Fenner* v. *Railroad*, 44 N. Y., 505, and other cases

The New York rule is also the law of England and of Canada. *Mitchell* v. *The Railway Co.*, 10 L. R. Q. B., 256; *Chapman* v. *Great Western Ry. Co.*, 5 Q. B. D., 278; *Richardson* v. *Canadian Pacific R. Co.*, 19 Ont. R., 369. It is, in effect, the same as that applicable to water carriers. Its distinctive feature is the requirement of actual notice to the party entitled thereto of the arrival of the goods, unless, after diligent effort so to do, the carrier, because of the death of the consignee, or of inability to learn his address, is unable to serve him with notice. The New York rule is obviously the more just one, since, under all the varying conditions of rail transportation of to-day, it is as impracticable for the consignee to anticipate the day and hour of arrival of trains, or the probable time of placement of cars, or tender of delivery, as it was for the consignee of goods transported by water to anticipate the time of arrival of the ship bearing his goods.

The carriers contend: (*1*) That the common-law rule upon the question of the difference in liability with respect to carrier and warehouseman has not been abridged or in any way affected by federal legislation; (*2*) that the rule proposed does not offend against either public policy or the interstate commerce act; (*3*) that the length of time given after notice more than meets the common-law rule of reasonableness; (*4*) that the definite form of the wording meets the requirement that the privilege be clearly specified; (*5*) that the shippers' proposal puts the question of liability back in the same situation that existed prior to the passage of the Carmack amendment and invokes the same uncertainty and lack of uniformity which the Carmack amendment was especially designed to avoid; and, (*6*) that the act gives the Commission no power to impose upon carriers a heavier liability than may be found in the statute and under the common law.

The shippers' opposition to the carriers' proposal is predicated upon the following grounds, chiefly: (*1*) That a rule terminating the carrier's liability after 48 hours after the giving or sending of notice of arrival at destination would inevitably result in many instances of injustice; (*2*) that the provision would terminate the carrier's

liability as such by the giving of notice even though, in the case of a carload shipment, the car were not placed and might not be placed for delivery within 48 hours after the giving or sending of notice of arrival; and (*3*) that in case of some commodities the free time under demurrage regulations for the unloading of carload shipments is more than 48 hours and that, therefore, the carrier's liability ought to extend through the time during which it is obligated, under tariff provisions, to hold the car for unloading by the shipper free of demurrage.

Upon broader grounds, more particularly in connection with the proposed provision designated as section 4, clause 1, *infra*, but upon grounds which it will be quite as appropriate to discuss here, the shippers contend against any limitation of the carrier's liability. It is urged upon brief in behalf of one group of shippers that "any service performed by the carrier is 'transportation' and that the liability of the carrier is that of a common carrier throughout the time the property is the subject of transportation as defined in the first section of the act to regulate commerce." * * * "That since storage and delivery are a part of transportation the carrier must be liable throughout the course of the property (transportation?) as a common carrier. The act to regulate commerce deals only with common carriers. The Commission should not permit the carrier to limit its liability to negligence, only, while property is in storage."

In behalf of another group of shippers it is urged (*1*) that property in possession of the carrier does not receive what can properly be termed a warehouse service; that the carrier can not leave the goods in the car, no matter how long the time, and claim warehouseman liability; that the warehouseman service must be actually given after the reasonable time for removal has expired; that when goods arrive at destination and are held in a vessel, car, depot, or place of delivery they are still receiving transportation service; (*2*) that such a holding of property is a part of the service that must be rendered in connection with the delivery, and is performed by the carrier as a common-carrier service; (*3*) that to restrict the carrier's liability to that of a warehouseman, only, when it does not render such a service would deprive the shipper of the benefit of the liability which the character of the service requires and would be a penalty of unnecessary and unreasonable severity for the failure to remove property at the expiration of 48 hours, failure for which the demurrage rules already provide a sufficient penalty; (*4*) that until the property is received or until such time as it should reasonably be removed, the shipper is entitled to demand that the carrier shall exercise the same diligence and be responsible to the same extent for property in its possession. (*5*) It is not claimed that the carrier should be held to

the liability of a common carrier for goods in its possession awaiting delivery indefinitely. The shippers express no opinion as to what would be a reasonable time during which the carrier might be required to continue its high degree of liability, but say merely that the law now prescribes that at the lapse of a reasonable time for the removal of the goods the carrier's responsibility as a common carrier ceases and it becomes liable as a warehouseman only; that what constitutes a reasonable time must be determined from all the circumstances and conditions affecting each particular shipment; that it is impossible to fix an arbitrary time to take the place of the reasonable time prescribed by law without resulting in many cases of individual hardship.

These arguments are apparently based upon a construction of the terminology of section 1 of the act to regulate commerce and of two decisions of the Supreme Court of the United States touching the carrier's liability in respect of goods remaining in its custody after arrival.

In *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S., 588, the question, as stated by the court, was, "Whether the limitation of liability (under which a shipment of household goods had been received and transported) may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman." The lower court had held to the contrary, reasoning that the limitation of the amount of the carrier's liability provided for in the bill of lading inured only to the benefit of the carrier as such and that the consideration of a reduced rate which supported the transportation contract could not be carried over so as to operate as a limitation of the amount of the carrier's liability in its capacity of warehouseman, but the Supreme Court ruled that the shipment having been made under an express contract made for the purpose of interstate transportation, such a contract must be determined in the light of the act to regulate commerce.

Discussing the language of section 1 of the act the court held that the term "transportation" included all services of the carrier in connection with the shipment, including storage of goods after arrival at destination. The court said:

> From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the term "transportation" and subjected to the provisions of the act respecting reasonable rates and the like.

The court's decision related only to the question indicated, viz, whether the *limitation of the amount* of liability provided for in the bill of lading had "spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman." The decision has no bearing upon the question as to *when*, or under what circumstances, the liability of the carrier, as such, ceases and that of warehouseman begins.

Shortly after this decision was rendered the case of the *Southern Ry.* v. *Prescott, supra*, came before the Supreme Court on error to the supreme court of the state of South Carolina. That case involved the liability of the carrier of an interstate shipment as warehouseman of the goods after their arrival at destination. One of the stipulations of the bill of lading, substantially the same as that which we are here considering, was that "property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of arrival" might be kept in car, depot, or warehouse, "subject to reasonable charge for storage and carrier's liability as warehouseman only." After arrival of the goods the consignee paid the entire freight charges and took away 4 of the 13 packages constituting the shipment. The company's agent consented that 9 packages might remain to meet the consignee's convenience in removal. Before they were called for the carrier's warehouse, with its contents, including the 9 undelivered packages, was destroyed by fire. The Supreme Court held that "transportation" as defined in the act includes the service of the carrier as warehouseman and that the retention of the part of the shipment in question was a terminal service forming part of the transportation service in the sense of, and governed by, the act to regulate commerce and that the carrier was liable for negligence only.

The duties of the carrier and the shipper in respect to the delivery of goods are reciprocal. The circumstances and conditions attending the delivery of freight at terminals in the large cities, and even from the depots of carriers in the smaller communities, are such that it is not only impossible for the shipper to anticipate the arrival of his goods and be there to receive them, but also it would be equally disadvantageous to the carriers, whose facilities for the receiving and handling of freight are so congested and inadequate in many communities that much time and thought on the part of transportation companies, public commissions, and regulatory bodies are being devoted to the solution or amelioration of such conditions.

The common-law rule varies in this country, as we have seen, there being three different applications, each in different jurisdictions. It might be argued, therefore, that any order issued by this Commission would have the effect of changing the rule in one or more of

these jurisdictions and would be beyond the authority of this Commission as being an attempted exercise of legislative functions not specifically delegated to it by Congress. We think no such question of our jurisdiction could be seriously raised upon the ground stated. Though perhaps mixed with the question of the common-law rule, it is primarily an administrative question. What we are really dealing with are certain rules, regulations, and practices of the carriers, viz, those upon which the question of the termination of the carrier's liability as such would cease under the law and its liability as a warehouseman would begin. The primary question is one of fact and as an administrative matter it is both desirable and proper, in order that unnecessary controversy may be avoided, that a reasonable rule should be adopted for the determination of this question. As a practical matter, it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position to be received by him and removed. Until they are so placed and tendered for delivery it is obviously impossible for the consignee to receive and remove them and the carrier can not reasonably be relieved of its common-law liability until it has so placed or tendered the goods for delivery. If the consignee, or other party upon whom is the duty to receive the goods, does not remove them within a reasonable time thereafter, the carrier's common-law liability should cease and become that of a warehouseman only. The consignee should have a reasonable time within which to remove the goods after notice has been duly received or given that they are *ready for delivery*, and the carrier's notice to the shipper should be one which not only notifies him of the arrival of the goods, but also that they are ready for delivery, or that, in the case of a carload shipment, the car has been placed at a designated place for delivery, or that the carrier awaits orders respecting its placement or delivery. This, in substance, is the common law and the established practice of the carriers even in those jurisdictions where, under the strict application of the Massachusetts and New Hampshire rules, they might not be required to give notice.

It is not the question of notice, as such, in this clause with which we are here concerned, for the carriers' proposal includes the giving of notice. The question is of the propriety and reasonableness of the proposal to reduce the high degree of carrier liability to that of a warehouseman; that is to say, to liability for negligence only, for loss or damage caused by fire after 48 hours (exclusive of Sundays and legal holidays) *after notice has been sent or given*. There can be no reasonable division, as between the carrier and the shipper, of the carrier's liability for the goods while they are in its custody and

until it has fulfilled its duty of delivery or, by reason of the consignee's neglect or failure, has, after reasonable efforts so to do, been unable to make the delivery. It follows therefore that there is a conflict between the provisions of the bill of lading limiting the free time to 48 hours after tender of delivery or notice that the shipment is ready for delivery, if the tariffs applicable give the shipper a longer time within which to remove the goods before demurrage or storage begins. The consignee is within his legal rights if he avails himself of the full time allowed by the tariffs and the carrier can not be presumed to be released from its liability, as such, while the goods are continued in its custody and the shipper, in accordance with privileges specifically accorded under duly published and filed tariffs, incurs no penalties.

We find that the provision in the proposed uniform bill of lading is open to the objection made by some of the shippers, to wit, that it makes the carrier's liability dependent upon the sending or giving of notice of arrival, and not upon a delivery, or tender of delivery. We think this objection should be removed, and that the clause should be amplified and changed to read as follows:

> The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of property upon consignee's order, has been made.

Section 1, clause 4, liability of carrier for property while stopped and held in transit.—The present uniform bill provides that:

> Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or from riots or strikes, or for country damage to cotton.

The standard bill contains a similar provision but without the parenthetical clause relative to the burden of proof.

The carriers desire to retain this provision in the proposed bill, but it is objected to by some of the shippers. The grounds upon which the carriers contend for this provision are: (*1*) That transit is a privilege carried in many tariff publications and that generally no extra charge is made for such service; (*2*) that it is granted upon condition that the carrier shall be relieved from liability as an insurer while the property is so held at the request of the owner; (*3*) that the property during that time is not within the full control of the carrier, but is held at a designated point under instructions from the shipper; (*4*) that the service is analogous to that of a ware-

houseman and the liability should be that of a warehouseman; (*5*) that the Commission is not empowered to extend the carriers' liability; (*6*) that shipments are held in transit frequently for a considerable length of time in cars and warehouses of the carriers; (*7*) that for so valuable a privilege held out by the bill of lading the carriers would be entitled to additional compensation for the liability assumed; (*8*) that in the absence of limitation in the contract the carrier's liability is that of a warehouseman only.

The shippers contend against the retention of this provision on the grounds: (*1*) That the stoppage in transit is a part of the service for which the transportation charge is made, or, as is often the case, for which an additional charge is made, and that if loss or damage occurs while the owner of the property is availing himself of a lawful provision of the tariff and the carrier is actually in possession of the property it can not absolve itself from liability; (*2*) that the property held in transit is still the subject of transportation and is subject to the same possibilities of loss or damage as though it were in course of actual movement or held in the yards awaiting switching movement.

No substantial evidence was introduced by the parties bearing upon this issue. The carriers argue that when the shipper steps in and exercises dominion over the property while it is in transit he takes it out of the power of the carrier to complete the transportation and, accordingly, that it has been held by the courts that in such case the liability of the carrier is reduced to that of a warehouseman only. *St. L., A. & T. H. R. Co.* v. *Montgomery*, 39 Ill., 335; *McVeagh* v. *A., T. & S. F. R. Co.*, 3 N. Mex., 205; *Elliott on Railroads*, §1543; Michie, *Carriers*, §1091.

They contend that stoppage *in transitu* is of value to the shipper, not only in cases of insolvency of the consignee, but very materially so in cases of diversion to meet different and advancing markets, and in a great many other ways; that for these reasons it is very largely taken advantage of by the shipper; that since it is such a service as is asked for by the shipper and granted by the carrier, it follows; first, that it should be specified; second, that it is both proper and right that the carrier should be permitted to specify its liability in connection with such a service.

In behalf of the shippers it is contended in a brief filed by the National Industrial Traffic League that "property held in transit is still the subject of transportation and as such is subject to the Carmack and Cummins amendments."

It is unnecessary for the purposes of this case to inquire into the principles upon which the legal right of stoppage *in transitu* rests. We are more particularly concerned with its development into the various forms of transit services which in the modern development

or extension of transportation services have come to be quite generally accorded to shippers under other circumstances and upon other grounds than those upon which the purely legal right of stoppage *in transitu* rests. Under modern practice the owner of goods may usually direct the carrier to stop his goods in transit; he may then reconsign them to another consignee; take delivery of them at a point intermediate to the original destination; order them diverted to a different destination, or returned to the original point of shipment. Such control over their property during transportation is freely exercised by shippers in this country and, where regularly done in accordance with commercial customs and practices, is customarily provided for by carriers in their tariffs. Sometimes the service is included in the stated rate or charge for transportation, in other instances an additional charge is made.

We have already discussed the question of the termination of the carrier's liability as an insurer of the goods after arrival at destination, and we have seen that such liability does not attach until property has been delivered to it for immediate transportation. When goods are merely delivered to a carrier or deposited in its warehouse and are not to be transported until further orders from the owner, the carrier's liability is that of a warehouseman or bailee only. *Wilson* v. *International Ry. Co.*, 160 N. Y. S., 367; *Louisville & Nashville R. R. Co.* v. *The U. S.*, 39 Ct. Cl., 405. The circumstances are somewhat different, however, when goods are held at an intermediate point because of interrupted transportation. As has been said with respect to the liability of the carrier as a warehouseman of goods while they are in transit: The owner loses sight of his goods when he delivers them to the first carrier and has no means of learning their whereabouts until he or the consignee is informed of their arrival at destination. At each successive point of transfer from one carrier to another they are liable to be placed in warehouses, or to be delayed by the accumulation of freight or other causes and exposed to loss by fire or theft. Superadded to these risks are the dangers of loss by collusion, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing of the goods under such circumstances should be held to be a mere incident to the transportation, and they should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route. *McDonald* v. *The Railroad*, 34 N. Y., 497; see also *Lewis* v. *Chesapeake & O. Ry. Co.*, 47 W. Va., 656; *Southard* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 60 Minn., 382.

It is otherwise, however, when the holding is at the instance of the owner of the goods and in the exercise of a right on his part, for then the carrier is placed in a different position with respect to the goods, and the circumstances of the case may divest the carrier of the high degree of responsibility which rests upon it while the goods are in its possession and in course of transportation. Under these circumstances the carrier, it is true, still has the goods in its custody, but the transportation which has been interrupted and interfered with by the owner can not be continued until further orders have been received from the owner. The carrier's function as a transportation agent is suspended for an indefinite, and often a long, period of time. "Thus where the goods have been delivered to the railroad company for shipment, and they were loaded upon its cars for that purpose and were about to be started, but the company was then requested by the owner to wait until he could see the party to whom he had sold them, which request was complied with; and the next day the goods, while being so detained, caught fire and were damaged, it was held that from the moment the request was made to detain the goods the liability of the company was as a warehouseman only". *1 Hutch. Carr.* (3d Ed.), § 113; *St. L., A. & T. H. R. R. Co.* v. *Montgomery, supra.*

The same principle, it would seem, should apply when, upon orders of the owner, property is stopped and held in transit pending further orders from the owner. The holding at the owner's order is not accessory to the transportation. The precise point at which the goods may be stopped and held, that is, whether in terminal yards or warehouses of the carrier, or at an intermediate point on the line of transportation, is immaterial.

From our study of the question we think that even in the absence of express stipulation the carrier's liability, under the circumstances contemplated, would be that of warehouseman, only, while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request.

Although the matter is not brought in issue, we are not satisfied with the carrier's claim of exemption, which is included in this clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for "delay caused by riots or strikes," as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable.

We conclude, therefore, that the stipulation proposed by the carriers is in accord with the law and is just and reasonable. It is therefore approved.

Section 1, clause 5, transportation in open cars.—In section 1 of the present uniform and standard forms of bills of lading it is provided that—

When in accordance with general custom on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be upon the carrier or party in possession.

The carriers desire to retain this provision in the proposed uniform bill, but the shippers object and offer the following as a substitute:

Property not customarily transported in open cars, when transported in open cars at the request of the shipper, shall be at the owner's risk as to loss or damage resulting from the use of such open car, provided such loss or damage could not have been prevented by reasonable care by the carrier or party in possession; provided further, however, that in the case of loss thereof or damage thereto by fire, the liability of the carrier or party in possession shall be the same as if the property had been carried in a closed car, and the burden to prove that the carrier exercised reasonable care shall be upon the carrier.

It is the custom to transport in open cars certain low-grade commodities and heavy or bulky articles, such as ore, coal, sand, stone, logs, lumber, machinery, engines, agricultural implements, including separators, traction engines, lumber products, poles, street cars, structural and other classes of steel, etc. Detachable parts are frequently included with machinery, engines, etc. More recently, because of the general shortage of equipment, automobiles have been extensively carried in open cars.

The reasons advanced by the carriers in support of the retention of this provision are: (*1*) that the use of open cars is largely for the convenience of the shipper or consignee; (*2*) that they are often used to reduce the cost of handling the freight (the shipper usually loading and the consignee usually unloading carload shipments), as well as for the shipment of articles too large or bulky to be loaded into box cars; (*3*) that there is an additional hazard, and that the carriers have great difficulty in policing the transportation in open cars of property that offers opportunities for pilferage, or is likely to be damaged by weather, or which is peculiarly susceptible to loss or damage to detachable parts that the shipper could remove and thus protect himself, but which he will not ordinarily remove if the carrier can be held liable for the damage.

It is contended on the part of the carriers that the provision in dispute has been long in effect; that it is not affected by recent legislative enactments and that there has been no evidence offered to show that the rule has worked any embarrassment or injustice, and that there is no reason to believe that in the future, any more than in the past, any shipping interest will suffer by the retention of the open-car provision in the bill of lading.

The shippers object to the language of the provision as it reads at present because they say; (*1*) that the practical effect is to restrict the carrier's liability for all goods carried in open cars to loss or damage by negligence only; (*2*) that property that is customarily transported in open cars is of such a nature as to be largely free from loss or damage, but when such loss or damage does occur it would ordinarily not be due to the use of open cars, and that the carrier should be subject to the same liability with respect thereto as it assumes with respect to property transported in closed cars; that to put the risk of loss or damage, not directly attributable to open cars, on the shippers would be to impose an unjust burden; (*3*) that it is the duty of the carrier to transport property that is not ordinarily transported in open cars and that it should be required to assume the liability; (*4*) that there is no reason for excusing the carrier from liability for loss or damage to goods transported in open cars when such loss or damage is not caused by the fact that an open car was used; that in any event, if property in open cars is to be shipped under a restricted liability, there should be a direct relation between the use of the open car and the loss or damage from which the carrier is to be exempted.

The shippers are willing to assent to a limitation of the carrier's liability when property not customarily transported in open cars is, at their request, so transported and loss or damage occurs as the direct result of the use of open cars. It is obvious, however, that a limitation so phrased might ultimately become inoperative because goods which are not now customarily transported in open cars might in the course of time, and as the result of changed conditions, come to be customarily so transported.

With respect to the evidential facts and conditions, it is to be observed that certain kinds of goods may, and of necessity must, be transported in open cars. Carriers commonly hold themselves out to transport such goods, and they must therefore receive and transport them when offered for shipment. In the absence of statutory prohibition, it seems, the carrier may stipulate for a limitation of its liability in receipt of goods so transported except, of course, that it can make no stipulation for exemption on account of loss or damage caused by its own negligence, *2 Hutch. Carr.* (3d Ed.), § 506, and under the law, when a consignor of goods agrees that they may be loaded and transported in open cars, the carrier, in the absence of negligence on its part, is not liable for any damage caused to the goods by their being so loaded and transported. *Western & A. R. Co.* v. *Exposition Cotton Mills*, 81 Ga., 522. But the carrier must exercise ordinary care and diligence even when the shipper agrees to or requests the transportation in open cars. *C., St. L. & N. O. R. Co.* v. *Moss*, 60 Miss., 1003; Michie, *Carriers*, § 1020.

We are of opinion that the exemption stipulated for in the present and proposed bill is too broad and too greatly favors the carrier to be entirely just and reasonable. Moreover, we think that it falls within the provisions of the Cummins amendment so far as it seeks to exempt the carrier from the liabilities with which it would be charged under the common law. To that extent it would be invalid and void. To the extent that the carrier would escape liability at common law, stipulation is unnecessary. We shall therefore not approve either the rule proposed by the carriers or the substitute offered by the shippers for inclusion among the conditions.

Section 2, clause 3, measure of carrier's liability for loss or damage.—In the uniform bill of lading approved by the Commission in its report *In the Matter of Bills of Lading, supra*, there was contained the following provision, which then constituted paragraph 2 of section 3 of the conditions:

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

One of the questions considered by the Commission in its report in *The Cummins Amendment, supra*, was thus stated:

May the carriers lawfully provide in their tariffs and rate schedules that their liability shall be for the full value of the property at the time and place of shipment?

Upon this question the Commission said:

It is urged that this rule would relieve the question of the amount of liability from uncertainty, would afford a reasonable and uniform method of determining the measure of recovery, save endless litigation with its attendant labor and expense, and avoid unjust discriminations.

The Cummins amendment clearly places upon the carriers liability for the full actual loss, damage, or injury to the property transported which is caused by them, and it makes unlawful any limitation of that liability, or of the amount of recovery thereunder, in any receipt, bill of lading, contract, rule, regulation, or tariff filed with this Commission, without respect to the manner or form in which such limitation is sought to be made. The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment.

Upon brief in the instant case the carriers say:

The carriers thereupon assumed that they were entitled to provide that liability should be determined with respect to the value of the property at the place and time of shipment, and the uniform bill of lading was amended so as to read:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid."

The carriers now propose, as clause 3 of section 2 of the proposed conditions, the following amended provision:

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the actual value of the property at the place and time of shipment under this bill of lading, including the freight charges, if paid; and where the actual value of the property has not been required to be specifically stated by the shipper in this bill of lading, such actual value shall be arrived at from the bona fide invoice price, if any, to the consignee.

The shippers object to this proposed language and propose the following:

The amount of any loss or damage to property, or loss or damage due to delay in the delivery thereof under this bill of lading for which the carrier is liable by law, shall be the full actual loss, damage, or injury, including freight charges, if paid.

While the rigor of the first Cummins amendment, which the Commission had under consideration in *The Cummins Amendment, supra*, was modified by the second amendment, it is still necessary to note that by the terms of the latter the right of the carrier to restrict its liability for loss, damage, or injury caused by it or its connections to the goods transported was revived, or restored, and made lawful *only* as "to property, except ordinary live stock, received for transportation concerning which the carriers shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property * * *." As to ordinary live stock and all other property not falling within the exceptions stated, it seems clear that the strict prohibitions of the first Cummins amendment still apply, and any such limitation of liability or limitation of the amount of recovery without respect to the manner or form in which it is sought to be made is unlawful and void.

It is true that the Commission in its report *In the Matter of Bills of Lading, supra*, approved a rule similar to the one now in effect, and which the carriers wish to retain. Such a rule was lawful, however, as of the time of that action and down to the time when the first Cummins amendment was enacted. There is no warrant for the broad construction which counsel for respondents in the instant case now seek

to put upon the language of the Commission in its report in *The Cummins Amendment, supra*. When closely read, it will be observed that the Commission did not give an unqualified affirmative answer to the question categorically stated (page 693). What the Commission did say was that "*where rates are lawfully dependent upon declared values*, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment." It is, therefore, believed that the liability of the carrier may be limited to the value of the property *so classified* and established as of the time and place of shipment.

To sum up what has been said upon the subject of the limitation of the carrier's liability for loss, damage, or injury caused by it or its connections, property received for transportation by carriers subject to the act may, for the purpose of testing the application of the first and second Cummins amendments, as we construe them, be divided into three classes: (*1*) Ordinary live stock, which by specific exclusion from the application of the second Cummins amendment is still subject to the first Cummins amendment prohibiting any limitation whatsoever, of such liability; (*2*) property, other than ordinary live stock, in respect to which the carriers have not been authorized or directed, in accordance with the provisions of the second Cummins amendment to make rates dependent upon values declared in writing by the shipper or agreed upon in writing as the released value of the property, and which, therefore, remains subject to the provisions of the first Cummins amendment, and (*3*) property, other than ordinary live stock, as to which the carriers, under the provisions of the second Cummins amendment, have been authorized or directed to make rates dependent upon declared or agreed values, in which event the carrier's liability is automatically limited to values predetermined by the declaration or agreement, and as to which, therefore, no controversy can arise respecting the time and place of ascertaining the amount of the carrier's liability.

The proposed rule stipulating that the measure of the carrier's liability shall be the value as of the time and place of shipment, even if valid, could have application only to property falling within classes 1 or 2 as above defined. The question is, therefore, whether the proposed stipulation as applied to such classes of property would be a limitation of liability or limitation of the amount of recovery and therefore unlawful and void. The shippers contend that it would. In the view that we take of the law, it is unnecessary to review the arguments of the parties at any length. The general rule of the common law is that the measure of damages for which the carrier is liable, in the absence of specific stipulations in relation

thereto, is the market value of the goods at destination, plus interest on such value from the date when, in general course, the goods should have been delivered, less the unpaid transportation charges, if any. *Mobile & Montgomery R. Co.* v. *Jurey*, 111 U. S., 584; *O'Hanlon* v. *Ry. Co.*, 6 Best & S., 484; *Rodocanachi* v. *Milburn*, 18 Q. B. Div., 67. To the same general effect are cases decided by the various state courts. Compensation on this basis will generally make the owner whole in respect of his loss.

The bill of lading provision here considered has come before the state courts for consideration in a number of cases. The decisions are not harmonious. It has been held that the rule is valid and reasonable. *Denver & R. G. R. Co.* v. *A. Peterson Grocery Co.*, 59 Colo., 125; *Matheson* v. *Southern Ry. Co.*, 79 S. C., 155; that its effect is not to limit or diminish the carrier's liability, but that it merely establishes a rule for determining the value of the property in case of loss. *Grubb* v. *Atlantic Coast Line R. Co.*, 101 S. C., 210.

The most recent discussion of the question whether or not the proposed rule operates as a limitation of liability in contravention of the Cummins amendment is contained in *M'Caull-Dinsmore Co.* v. *Chicago, M. & St. P. Ry. Co.*, 252 Fed., 664, where the district court for Minnesota, citing the provisions of the statute, reasons thus:

> Under this language, is the provision or stipulation above referred to in the bill of lading unlawful and void? If it is an agreement as to value, which I think it is not, it is clearly so. The answer to the question must therefore be found in the answer to the further question: Was this a limitation of the liability of the carrier, or a limitation of the amount of recovery? And it seems to me the answer to this question is found in the answer to the further question: What would have been the liability of the carrier, and the consequent amount of recovery, if that provision or stipulation had not been in the bill of lading? In the latter case there can be no question, and it was so admitted on the argument, as it had to be, but that the liability and the consequent amount of the recovery would have been that of the common law, namely, the value of the goods at the point of destination at the time they should have been delivered; and that this is the actual loss to the shipper caused by the failure of the carrier to deliver the goods at that time and place, whether the value is greater or less than at the time and place of shipment, is the foundation of the common-law rule.
>
> From the foregoing simple statement, I do not see how it is possible to escape the conclusion, upon a fair and open-minded consideration of the language of the amendment and the obvious and well-known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery, and is therefore unlawful and void.

The proposed rule, being superfluous so far as concerns the transportation of property shipped under rates dependent upon declared or agreed values, and unlawful and void in respect of all other property, we condemn it and direct its complete elimination from the proposed bill. This will involve a slight modification of the context

immediately following the phraseology eliminated as indicated in the form prescribed by the Commission (Appendix B).

Section 4, clause 1, general liability of carrier as warehouseman after 48 hours.—This clause is the third in the trio of provisions in the proposed conditions which seek to limit the carrier's liability to that of warehouseman while the property is still in its possession. (See discussion of section 1, clauses 3 and 4, *ante*.) The provision reads as follows:

> Property not removed by the party entitled to receive it within 48 hours (exclusive of Sundays and legal holidays), after notice of its arrival has been duly sent or given, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. Nothing in this paragraph shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Similar or identical provisions have for several years been incorporated in the uniform and standard forms of bills of lading. The carriers wish to retain it, but the shippers propose that the provision be eliminated without substitution.

Upon analysis, it will be observed that the provision contains three distinct propositions: (*1*) That, subject to different provisions of local rules or law, the free time for delivery or removal of property shall be limited to 48 hours after *notice of arrival* has been duly sent or given; (*2*) that after the expiration of that time the property may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, etc., subject to established charges for storage and liability of the carrier as warehouseman only; or, (*3*) may, at the option of the carrier, be stored in a public or licensed warehouse at the place of delivery or other available place at the owner's risk and cost, and without liability on the part of the carrier, and subject to a lien for freight and other lawful charges, including storage.

With respect to the first proposition, it is scarcely necessary to do more than direct attention to the nature of the criticism against the somewhat similar provision of section 1, clause 3, considered in a prior part of this report, respecting the carrier's proposal to limit the liability to that of a warehouseman "after 48 hours * * * after notice of the arrival of the property at destination has been duly sent or given." The same considerations which have seemed to us to require a modification of the phraseology of that rule apply here as well, viz, the consignee should have the benefit of the 48 hours free time after *tender* of the property for delivery, or, in the case of a car-

load shipment, after notice that the car has been *actually placed* at the accustomed place of delivery or is *held subject* to the owner's orders for disposition, and subject, moreover, to any provisions of lawfully filed tariffs that may permit a longer time in individual cases, or with respect to particular commodities.

So, in respect to the proposition to reduce the carrier's liability to that of a warehouseman only, after tender, or reasonable effort to effect delivery of the property has been made by the carrier, the fundamental governing principles which have been considered in connection with the provision in section 1, clause 3, discussed, *ante*, control here.

One particular objection to the clause here considered is laid against the phraseology of the provision that in the event of non-delivery after specified time the property may, at the option of the carrier, be stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, "and there held at the owner's risk and," etc. It is urged in behalf of some of the shippers that if the entire paragraph is not eliminated that at least the words "at the owner's risk and" should be eliminated, leaving the wording to read "and there held without liability on the part of the carrier." It is urged that this be done because there is at least a possibility that it might be held, under the terms of the provision, that the public or licensed warehouse in which the goods are stored incurs no liability whatsoever, even as a warehouseman, although its regular storage rates are being paid by the shipper or consignee.

We think this objection is well taken. As stated upon brief by the shippers, "clearly the purpose of the phrase above quoted is only to relieve the carrier from liability where the goods are sent to a public or licensed warehouse, and there is obviously no reason why the carrier should include in its bill of lading a phrase which may be construed as relieving the public or licensed warehouse from any responsibility whatsoever for the safe-keeping of the goods."

The rule can not be approved in the form proposed by the carriers. In lieu thereof, we are of the opinion that a rule phrased as follows would be just and reasonable.

Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or, at the option of the carrier, may be stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the

carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Section 4, clause 9, receipt or delivery of property at private or other sidings, wharves, landings, etc.—Section 5 of the present uniform bill of lading provides:

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at the risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at the owner's risk until the cars are attached to and after they are detached from trains.

A similar provision at present incorporated in the revised standard form of bill of lading and constituting clause 9 of section 4 of the proposed bill, reads as follows:

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and, except in case of carrier's negligence, when received from or delivered on private or other sidings or on such wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains or unloaded into and after unloaded from vessels.*

The shippers propose the elimination without substitution of that portion of the clause printed in italics above.

The practical effect of that part of this provision to which objection is made is to relieve the carrier of all liability, except for its own negligence (for which it would be liable in any event), for loss, damage, or injury caused by it or by any connecting carrier, to property received from or delivered on private or other sidings, wharves, or landings, occurring at any time when the property is not in a car actually attached to a train or actually in or on a vessel.

The carriers refer to the fact that a similar provision has long been carried in the uniform bill of lading and ask consideration of the testimony of their traffic and claim officers, "with the hope that it may be found possible to dispose of the matter so as to conserve all interests." Evidently this precatory expression is prompted by the disposition of some of the shippers, evidenced during the course of the hearing, to accept a compromise provision. The carriers do not argue the question upon brief, but content themselves with the observation that some of the shippers seem to admit, by inference, that there are some sidings, other than private sidings, on which full common-carrier liability should not be imposed, and contend that there are almost numberless situations where all that can be required of carriers, with respect to property on sidings other than private sidings, is the exercise of ordinary care.

The shippers contend that this provision is not only unreasonable, but that it is in open violation of the law; that by their attempt thus

to limit their liability to that for negligence only, the carriers openly seek to do that which under the law they may not and can not do. Carload freight, when not received and delivered through the carrier's freight or warehouses or upon its docks, is commonly handled upon public team tracks of the carrier or private sidings of the shipper or consignee. It is urged that if a common carrier could limit its liability as proposed, it would, in effect, be liable as a common carrier only in respect of goods received at or delivered from its freight houses.

The carriers' proposal must be considered in the light of actual conditions and general practices obtaining where property is received and delivered at private or other sidings, and of the reasonableness and lawfulness of the proposed limitation. At almost every point in this country where freight is received and delivered, carriers have so-called public team tracks at which carload freight is handled. They are owned by the carriers and are therefore comprehended within the phraseology, "other sidings," as used in the proposed clause in distinguishing them from private sidings owned or controlled by the shippers. Warehouses, elevators, mills, and other industries of shippers are often located upon side or spur tracks connecting with the carriers' main tracks. These side or spur tracks, generally devoted to the exclusive use of one or a few shippers, may be located upon the carriers' rights of way and owned by them, or they may be privately owned by the shippers. The circumstances and conditions of the use of these private tracks are generally similar to those of public team tracks, except, as stated, the use of the private tracks is generally restricted to one or a few shippers, and is not open to the general public. Public team tracks are indisputably part of the carriers' facilities for the receipt and delivery of freight. They are extensions of its terminal facilities and so, it seems, are private industrial tracks or spurs under certain conditions. *Los Angeles Switching Case*, 234 U. S., 294.

In the absence of statutory prohibition, the carriers might doubtless contract for limitation of their liability as proposed, but the shippers contend that it is unreasonable and unjustly discriminatory. Upon brief they urge:

> The shipper whose freight is received or delivered upon a siding pays the same rate as the shipper whose freight is received or delivered through the freight house. For the latter the carrier assumes liability from the time of delivery by the shipper to the carrier until the time of delivery by the carrier to the consignee; for the former the carrier now proposes to limit his liability and give to the shipper whose freight is received or delivered on sidings a lesser service and assume a lesser liability than is given to and assumed for the shipper whose freight is received and delivered through the freight house. But to both the same rate is charged. Such a situation would create an unjust discrimination against the shipper whose freight is either received

or delivered upon a siding. That shipper is entitled to the same degree of liability upon the part of the carrier as other shippers paying the same rate * * *.

The condition proposed by the carriers is also unreasonable. As pointed out above the property in detached cars after delivery by the shipper before delivery by the carrier is in the full possession of the carrier. The carrier's duty toward the property does not cease with the breaking up of trains and it begins before trains are assembled. During the entire course of transportation, which begins with the delivery of the shipment by the loading of it into the car and ends with the delivery of the property by unloading it from the car, the carrier's liability should continue. The shippers have a right to demand such liability and the carriers have no reasonable ground for restricting it.

The carriers' proposal does not directly involve any of the mixed questions of law and fact as to when property has been delivered to a carrier and its liability as such begins. It is, in effect, a proposal to limit or defer the attachment of that degree of liability until the property, after having been received for transportation, and after having come into the custody and under the absolute dominion of the carrier, shall have come into a certain condition or position incidental to the actual transportation, i. e., until it is loaded into a vessel, or until the car in which it is loaded shall have been attached to a train.

So, in respect of shipments transported by a carrier for delivery to a consignee at destination, the proposal would terminate the carrier's liability, as such, even more abruptly and under even less justifiable circumstances than were discussed in a prior part of this report, in connection with the proposal in clause 3 of section 1, to limit the carrier's liability to that of warehouseman after 48 hours after notice of arrival of the property at destination had been duly sent or given. We say more abruptly because, under the proposal we are here considering, the carrier's liability would apparently be terminated as soon as a shipment had arrived and been set out of the train in the yards at the destination terminal—even before the giving of notice to the consignee.

Then, again, the shipper or consignee would apparently have to assume the risk even though, under the carrier's tariff, it might be entitled to 48 hours or more to remove or unload the property after the receipt of notice of arrival. Indeed, it is not clear how the proposal we are here considering can be reconciled with some of the other proposals of the carriers that we have heretofore considered and discussed, relative to the transition of the carrier's liability from that of an insurer to warehouseman. The liability of a railroad company as a common carrier continues after the arrival of the goods in a freight yard at the city of their destination until they have been placed at the disposal of the consignee, though the bill of lading provides that the carrier shall not be liable after the arrival of the

goods at their destination. *Liverpool & L. & G. Ins. Co.* v. *M'Neill*, 89 Fed., 131. Notwithstanding such a provision in the bill of lading, public policy has been held to so modify the contract as to give the consignee a reasonable time within which to remove the goods after arrival before the carrier's liability as such ceases. *Tallassee Falls Mfg. Co.* v. *Western Ry. of Alabama*, 128 Ala., 167.

It seems scarcely necessary to discuss the merits of this proposed limitation further, nor, in the view that we take of the matter, is it necessary to consider whether or not it would be in violation of the Cummins amendment. We think the proposal indefensible. The law affords sufficient protection to the carrier in the almost numberless variety of circumstances in which the application of such a limitation in the bill of lading might be invoked. We therefore find that the proposal expressed in italics is and would be unreasonable and should be omitted.

Section 4, proposed new provision for notice to consignor and consignee in the case of loss resulting in nondelivery and to the consignor in the case of goods refused or unclaimed at destination.—The shippers propose the incorporation in section 4 of the bill of lading of a new rule providing for notice to the consignor and consignee in case of loss resulting in nondelivery of the property, and to the consignor when shipments are refused or unclaimed at destination. The proposed clause reads as follows:

> Where the said property provided for in this bill of lading is lost or destroyed, resulting in nondelivery of the shipment, the carrier or party in possession shall immediately give notice thereof both to consignor and the consignee. If the property covered by this bill of lading is plainly marked with the name and address of the consignor, or if the carrier's agent at destination has otherwise specific notice thereof in writing, and such property is refused or unclaimed at destination, the carrier or party in possession thereof shall send notice of such refusal or nonclaim to the consignor within such time and by such means as may, in the circumstances, be reasonable.

The shippers advocate the incorporation of such a provision in the proposed bill, because, they say: (*1*) The observation of such a practice will tend to reduce losses to the shipping public; will obviate the necessity of tracing shipments, and diminish the number of claims; (*2*) that the proposed provision would be reasonable and requires merely the exercise of due diligence; (*3*) that it would work no hardship on the carriers, because the consignor could, as a practical matter, be notified only where he had taken the precaution to insure its being done or where the billing plainly indicated the name and address of the consignor; (*4*) that a similar rule was required to be established by the express companies and is to-day incorporated in the standard express receipt; (*5*) that a rule providing for notice to the consignor in case of loss or destruction of the property making

delivery impossible would be reasonable, because in such a case knowledge of the fact would be solely in possession of the carrier and prompt notice to the consignor would frequently enable the shipper to minimize his loss and enable him promptly to comply with his contract by replacing the goods; (*6*) that a rule providing for notice to the consignor in case of goods refused or unclaimed at destination would often prevent the accrual of demurrage and storage charges which might amount to more than any profit that could be expected from the sale of the goods; moreover, the latter may deteriorate or the market price decline; (*7*) that what all parties should seek to do is to prescribe the best method, both for the carrier and the shipper, that will expedite the transportation of property and limit or lessen the loss to any parties connected with the transaction; (*8*) that it is now almost a uniform practice for carriers to give notice, substantially as provided for in the clause suggested, and since it is to that extent now regarded by the carriers as good business practice it ought to be made obligatory.

The shippers point out that provisions of the bill of lading already agreed upon provide for notice to the consignor when nonperishable property is refused or unclaimed at destination, but that under this rule the notice to the consignor is one of intention to sell the property for charges after a certain length of time and that it is not given promptly or within reasonable time; that the rules already agreed upon provide that where perishable property is refused at destination, or the consignee fails to receive it promptly, the carrier may, in its discretion, to prevent further deterioration, sell the same to the best advantage at private or public sale, and that if there is sufficient time to send notice of refusal or failure of the consignee to receive the property, such notice will be sent to the consignor in order that he may give disposition orders, if possible, but, the shippers insist, such notice should be sent to the consignor whether or not there is sufficient time to receive a reply giving such orders.

The shippers explain that the provision that notice may be given "within such time and by such means as may, in the circumstances, be reasonable" means that the carrier shall be expected to make use of the telegraph in case of nondelivery of perishable property, which in many cases might make it practicable for the shipper to give, and the carrier to receive, disposition orders. They say, however, that the carrier should, of course, in any event, be permitted to make disposition of perishable property, if necessary, without awaiting disposition orders.

The carriers seem to be disposed to dispute not so much the desirability of the end sought to be attained by the rule as the propriety of giving it, as they say, a "bill of lading status." Their

testimony is to the effect that they are now exerting themselves to give notice to the consignor of property when it is lost or destroyed in a wreck, or when it is refused or unclaimed at destination. They contend, however, that in the case of lost or astray shipments, it would be impracticable to give immediate notice to the consignor, because frequently shipments are mislaid or delayed in transit or go astray and subsequently turn up. Under the operation of Freight Claim Association rules carriers diligently seek to trace lost or astray shipments and to give notice to the shipper or consignee, or both, as speedily as it is practicable to do. They refer, upon brief, to a statement in an opinion of the Supreme Court in *Georgia, Fla. & Ala. Ry.* v. *Blish*, 241 U. S., 190, as aptly depicting the circumstances under which carriers necessarily operate, viz, that "the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction." The carriers also cite the case of *Kehoe & Co.* v. *N., C. & St. L. Ry. Co.*, 14 I. C. C., 555, as one in which the Commission, having under consideration a claim by the complainant that the delivering carrier should telegraph the consignor in the event of a shipment refused by consignee, or which could not be delivered because the consignee could not be found, declined to impose upon the carrier the duty of sending a telegraphic notice to the consignor.

The proposed rule, which contemplates imposing upon the carrier two affirmative duties, viz: (*1*) notice in case of loss or destruction of property, (*2*) notice in case of refusal or failure of consignee to claim property at destination, has no bearing upon the degree of the carrier's liability, which is, dependent upon the circumstances heretofore discussed, either that of an insurer or warehouseman. There is no suggestion that the incorporation of the proposed rule in the bill of lading, or its omission therefrom, will either limit or enlarge the carrier's liability under the common law or the statute. The duty of railroads in respect to the delivery of property, it may be noted, is different from that of express companies. By custom, usage, and upon grounds of impracticability, the old common-law obligation of carriers to make personal delivery to the consignee is no longer applicable to railroads; it is different, however, with express companies which are, by general custom at least in cities and larger towns, obligated to make personal delivery within defined territorial limits.

At common law "the duty to give notice to the consignor or owner of the goods, in case of their refusal by the consignee, or

when he is absent or can not be found, can arise only when the carrier is required to make personal delivery or to give notice to the consignor of their arrival. It has no application to railroad companies when they are only required to deposit the goods in their warehouses to await the call of the consignee without notice to him. * * * The failure as warehouseman to give such notice would not be such negligence as to make them liable in that character for any loss which might be thereby occasioned." 2 *Hutch. Carr.* (3d Ed.), § 725, citing *Merchants', etc., Co.* v. *Hallock*, 64 Ill., 284; *Weed* v. *Barney*, 45 N. Y., 344. But it is different, it seems, in jurisdictions where the giving of notice of arrival to the consignee is required, for there, according to what appears to be the better authority, the consignor should be notified. Under the Carmack amendment the initial carrier is liable for any loss or damage resulting from the failure of the final carrier to notify the consignee of the arrival of the goods at destination, and for its failure, on the consignee's refusing to accept them, to store the goods for the account of the shipper or to exercise proper care in holding them for him. *American Merchants' Union Exp. Co.* v. *Wolf*, 79 Ill., 430; *N. C. & St. L. Ry. Co.* v. *Dreyfuss-Weil Co.*, 150 Ky., 333.

We perceive many difficulties in the practical application of a hard and fast rule of the character proposed by the shippers. Goods frequently go astray for a long time, and afterwards turn up; packages are sometimes marked in such a careless manner as not to be readily identified with the description in the billing. In such cases, it would be practically impossible for the carrier to comply with the strict letter of the proposed rule to give *immediate* notice. The only circumstances in which the carrier could give immediate notice of loss or damage would seem to be, as testified to by carriers' witnesses, in case of wreck, and it is now the practice, at least of many of the carriers, to give such notice. With respect to the second sentence of the proposed rule, others in the bill of lading already agreed upon provide for notice in the manner and under the circumstances therein defined. Moreover, the carriers now have a general custom, as testimony shows, of giving notice to the consignor in the event the property is refused or not claimed at destination. It is a matter of knowledge to the Commission, that under the Freight Claim Association rules and practices, carriers have greatly improved their services in this respect. It is undoubtedly to the mutual interest of the carrier and shipper that such notices should be given, but we have no reason to believe that the carriers fail, in the general conduct of their business, to exercise due diligence and observe good business methods in respect to the giving of such notices. We see

no reason, therefore, for incorporating a rule in the bill of lading of the character proposed and do not approve it.

Section 7, clause 2, liability for payment of freight charges.—This clause in the proposed bill reads:

> The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carriers shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges.

The parties are in agreement upon the phraseology of this section, except in respect to one part of it which appears to be regarded as important. The shippers propose that there be inserted in the bill, immediately following the words, "face of this bill of lading," the additional words, "or in a written order of reconsignment." The carriers earnestly object to the shippers' proposal.

A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it, and it is entitled to assure itself of such compensation by demanding it in advance. In ordinary commercial practice, however, the carrier waives its right to prepayment of charges and looks to the consignee for the same, its claim being secured by a lien upon the goods. There is a presumption, when goods are transported without exaction of charges in advance, that the consignee is liable for the same as the owner of the goods and that the carrier may look to him for payment. This, however, is a rebuttable presumption. The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges. In order to secure exemption from liability for the freight charges in case the shipment is delivered to the consignee without the collection of such charges, the consignor is required to append his signature to the following statement in a space on the face of the bill of lading provided for that purpose: "The carrier shall not make delivery of this shipment without payment of freight and other lawful charges."

The shipper's desire that the consignor's stipulation in the bill of lading for exemption from liability for freight charges be carried over to "a written order of reconsignment" is based upon several reasons. It is urged, upon brief, that "it often happens that upon reconsignment the new consignee will be one in whom the consignor does not have the same degree of confidence that he had in the original con-

signee." It is urged, also, that when an order of reconsignment is made the bill of lading accompanying the shipment must be located and changed and that "when such change is made in the bill of lading it will require little additional effort to make the necessary notation to the effect that delivery shall not be made without requiring the payment of the charges." It is further urged that to omit a provision of this kind from the bill of lading will prevent the shippers enjoying a large measure of the protection carried by section 7 against bills for overcharges or for freight charges not paid by parties who, at the time the freight was received, were amply able to pay the charges thereon.

The carriers object to the insertion of this provision in the bill of lading upon the grounds—

that it is unreasonable to expect the carriers to attach to the very valuable privilege of reconsignment, already sufficiently burdensome to them, an incident which would certainly produce complications and losses. In the first place, the provisions, if amended, could have but a partial and uncertain application to reconsigned shipments, inasmuch as shipments are so frequently reconsigned without a written order by the original consignor. It could not be given a general application without a universal tariff prohibition of reconsignment in any instance whatever, except upon the actual written order of the consignor. In the second place, a carrier, touching the important matter of the payment and collection of freight charges—a matter which relates to the paramount purpose of the act to regulate commerce itself—should be permitted to rely upon the bill of lading issued when the transaction is initiated and not compelled to observe instructions which would often be hastily and inaccurately transmitted while the shipment is en route. In the third place, it is much easier for a consignor to take the onus at the outset of determining whether he will assume and continue to bear the common-law liability for the payment of the freight charges, or the qualified liability which will accrue under the provision conceded by the carriers, than it is for a carrier to guard against the consequences of having an attempt made to change the liability status while the shipment is being transported.

We do not regard the shippers' proposal favorably. Its effect would be to impose upon the carrier additional risk and responsibility, not in respect of any common-law or statutory duty of *transportation*, but in respect of the security of compensation for its services. The end desired by the shippers has to do with the convenience and security of their oftentimes speculative and impromptu commercial transactions. The business of the carrier is to furnish transportation. Its legal obligations are confined to transportation and the duties incident thereto. It is not obligated to assume risks for the convenience of the consignor which have no direct relationship to its service of transportation.

The Commission is not disposed to approve the laying upon carriers of duties or obligations extraneous to the service of transportation, except and unless to remove unlawful discriminations, and such are not shown to exist here. The suggestion of the shippers is, therefore, disapproved.

Section 9, clauses 1, 2, 3, 4, 5, and 6, limitations of liability of water carriers.—Section 9 of the bill as proposed by the carriers, and as revised subsequently to the Washington conferences, reads as follows:

(1) Except in case of diversion from rail to water route, which is provided for in section 2 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with statute or this section, and subject also to the conditions, except in the case of negligence on the part of the carrier or party in possession not provided by statute, that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lakes, seas, or other waters; or from vermin, leakage, chafing, breakage, heat, cold, frost, wet, or change in weather, or by riots, strikes, stoppage of labor or threatened violence, or delay caused by stress of weather, or causes beyond the carrier's control, explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances, whether existing prior to, at the time of, or after sailing; or unseaworthiness; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. (2) And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, to transship, to lighter, to load and discharge goods at any time, and assist vessels in distress and to deviate for the purpose of saving life or property; for docking and for repairs. (3) Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

(4) If the shipowner shall have complied with the provisions of section 3 of the Harter act, it is hereby agreed that the owners or consignees of the cargo shall contribute with the shipowner in general average, and shall pay any salvage or special charges incurred, even though the necessity for the sacrifice or expenditure was brought about by fault in navigation or management of the ship.

(5) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

(6) The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors when performed by or on behalf of the rail carrier.

Some of the shippers object to the incorporation in the bill of any conditions stipulating or defining exemptions of water carriers. They propose the elimination of clauses 1 to 5, inclusive, and, further, that clause 6 shall then be changed to read:

The transportation of any property under the terms of this bill and by lighter, water float, or car ferry, in or across rivers, harbors or lakes, shall be deemed to be transportation by rail.

Various other substitute clauses are suggested by other shippers who do not unconditionally oppose the inclusion in the bill of any conditions relative to water carriage. The objections are predicated principally upon the proposition that water carriers are already permitted by specific enactments of Congress to limit their liability

to such a liberal extent that further limitations should not be approved. Moreover, it is contended many of the limitations of their liability which the carriers seek to make through the incorporation in the bill of the clause quoted above would be in violation of the law and therefore null and void, and that the only possible effect to the shipper that could follow from their being printed in the bill would be to mislead the shipper and perhaps discourage or deter him from filing or insisting upon the payment of claims in which he might have a perfectly good cause of action.

Congress has enacted numerous statutes affecting the rights and liabilities of water carriers. The principal acts under which, or in view of which, the proposed conditions are apparently put forth, are the so-called fire act of March 3, 1851, 9 Stat. L., 635; R. S., §§ 4282, 4283, which provides that the owner of a vessel shall not be liable for damage to goods caused by fire on such vessel "unless such fire is caused by the design or neglect of such owner"; and releasing the owners of vessels from all damage in excess of the value of the ship, and the freight then pending, except either by "privity or knowledge" on the part of the owners; and of the principal federal statute restricting the liability of water carriers, known as the Harter act, 27 Stat. L., 445; 2 Supp. R. S., 81.

Conditions similar to those proposed have for some time been carried in the present uniform and revised standard forms of bills of lading. It frequently happens that a shipment moves by rail to a port, or place of transshipment by water, and is routed beyond via the line of a water carrier to final destination. In such cases both the shipper and the consignee may be far distant from the point of such transfer from rail to ship, and in a great majority of such cases it is impracticable to secure a surrender of the railroad bill of lading at the point of transfer or to there make delivery to the consignee. As stated upon brief in behalf of the Pacific Coast Steamship Company—

> the result has been that such shipments have been carried by the water carrier subject to the conditions; limitations of liability; provided by the rail carrier's bill of lading—this although the water carrier's rate for the shipment is that provided for a port to port transportation that is subject to the limitations of liability provided by *its* bills of lading for a strictly port to port transportation. That is, in such case the carrier assumes a greater liability for a shipment that so comes to it, from a rail carrier, than it does if the shipment originate at the point of such transfer.

As the water carriers' port-to-port rates are adjusted upon the basis of the lesser liability provided by its bill of lading, one result is, in effect, that the local shipper is discriminated against.

Section 1 of the act specifies:

> That the provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control,

nanagement, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia, to any other state or territory of the United States or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country, etc.

By section 5 of the act, where the Commission has found that the operation by railroad, or other common carrier subject to the act, of any carrier by water not operating through the Panama Canal, is in the public interest and may be extended or continued beyond July 1, 1914, it is provided that:

> In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation.

By section 6 of the act it is further provided that:

> When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single state, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the act to regulate commerce, as amended June eighteenth, nineteen hundred and ten: * * * (b) To establish through routes and maximum joint rates between and over such rail and water lines * * *.

These provisions of the act clearly bring water carriers within its operation and control when, and if, they participate in arrangements for continuous shipment and carriage.

The Cummins amendment requires any common carrier, railroad, or transportation company subject to the provisions of the act, receiving property for transportation as defined therein, to issue a receipt or bill of lading therefor, and makes such carrier liable to the lawful holder thereof for the "full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading," etc. Many of the exemptions proposed to be incorporated in this section for the benefit of carriers by water would be in direct violation of the provisions of the Cummins amendment which we construe as applying to such carriers when used in connection with a rail carrier under a common control, management, or arrangement for a continuous carriage or shipment. Carriers by water that are subject to the act, or that are willing to subject themselves to the act, by participating in the transportation of interstate traffic under arrange-

ments with a railroad for through and continuous carriage and shipment of goods, must accept and be bound by the provisions of the act, including the provisions of the Cummins amendment, in respect to liabilities of carriers.

The exemptions from liability which the respondents desire to incorporate into the bill of lading solely on behalf of carriers by water, when they participate in transportation subject to the act, might be proper in respect of transportation from port to port, or to transportation of such other character as does not fall within the Cummins amendment. With such transportation we have nothing to do, but it is our opinion that, as applied to the transportation by a water carrier under an arrangement with a railroad for common control and continuous carriage or shipment, the proposed rule would be in contravention of the Cummins amendment and therefore null and void.

We can not approve its incorporation in the proposed uniform bill of lading.

PART 2.—THE EXPORT BILL OF LADING.

JURISDICTION OF THE COMMISSION.

This proceeding, so far as it involves an inquiry relative to export bills of lading and questions appertaining thereto, presents, in some respects, an original field of investigation by the Commission, since no investigation directed specifically to that subject has been conducted heretofore by it. Questions relating to such bills have come incidentally before the Commission in other cases, but usually upon questions involving issues of undue preference or prejudice in the practices of the carriers.

By reason of its peculiarities of form and substance the export bill stands somewhat apart from the domestic and live stock bills. The Commission has no authority to require of carriers the issuance, as such, of joint through export bills on traffic destined to nonadjacent foreign countries, because it has no authority or jurisdiction over the carriers from the port of export and could not prescribe the conditions to be written into a bill of lading covering the transportation by such carriers, which conditions, of course, constitute an essential part of the contract for through transportation; but, as was said in *Galveston Commercial Asso.* v. *A., T. & S. F. Ry. Co.*, 25 I. C. C., 216, this does not mean that the Commission may not, in a proper case, exercise its authority over the inland carrier to the port. While its authority over bills to nonadjacent foreign countries is, as already indicated, more limited and attaches more indirectly than in the case of bills covering domestic interstate traffic, or traffic to an adjacent foreign country, it nevertheless does have authority over the rules, regulations, and practices, of inland carriers subject to the act, when, and if,

they join in through bills of lading to nonadjacent foreign countries, and it requires such rules and regulations to be published and filed. (Conference Ruling No. 378.)

The transportation of traffic from an inland point to a port of export, for export, is subject to all the provisions of section 1 of the act. This is true even when the transportation to the port is performed wholly within the confines of the state in which it originates and whether the traffic be carried on local or on through bills of lading. *Red River Oil Co.* v. *T. & P. Ry. Co.*, 23 I. C. C., 438; *Texas & Pac. Ry. Co.* v. *Railroad Com'n of Louisiana*, 183 Fed., 1005; *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S., 498. Not all the provisions of the act, however, are applicable to export traffic. The Carmack amendment, as we have seen, applied only to transportation "from a point in one state to a point in another state," but the provisions of the Cummins amendments include "transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor."

The principal differences between the carriers and the shippers with respect to the terms and conditions which should, or should not, be incorporated in the export bill seem to arise (1) from the question whether or not the Carmack and Cummins amendments apply to traffic to a nonadjacent foreign country, (2) whether the rail carrier in delivering at its terminus, or at the end of its haul, may be treated as delivering to a consignee or his agent, or must be treated as delivering to a connecting carrier.

The Cummins amendment is of comparatively recent enactment and our attention has not been directed to any judicial decisions in respect of its provisions that point the way to a determination of the question whether or not it applies to foreign commerce to a nonadjacent foreign country. On the other hand, the application of the Carmack amendment has been considered in a number of cases and it is in the light of these decisions that we must consider the similar questions relative to the effect and application of the Cummins amendment. In *Houston East & West Texas Ry. Co.* v. *Inman, Akers & Inman*, 63 Tex. Civ. App., 556, involving the question of the application of the Carmack amendment to a shipment of cotton from a point in Texas to a port in Germany, the court having occasion to consider the language of the amendment and to construe the meaning of the word "state" held:

> This language is clear and unambiguous, and the prohibition against the right of a connecting carrier to limit its liability to loss or damage occurring on its own line is only applicable when the shipment is from "a point in one state to a point in another state." The use of this language excludes the idea that Congress intended to prohibit such contracts when the shipment was to a foreign country.

The word "state," as used in the constitution of the United States, has been uniformly construed to mean a constituent member or part of the federal Union having an independent local governmental organization, but as used in the statutes and treaties of the United States it has been construed to include territories of the United States, and also foreign countries or states when such construction is required by the context of the act or instrument, and is necessary to effectuate its evident purpose. * * *

We think it clear from an examination of the entire act that the word "state," as used in the amendment in question, was used in its limited constitutional sense, and was intended to mean a state of the federal Union. Other portions of the act are expressly made applicable to shipments from "any state or territory or the District of Columbia to any other state, territory or District of Columbia, or to any foreign country," showing that Congress did not understand or intend that the word "state," as used in the amendment, should include a foreign state or country, as well as a state of the Union.

In *J. H. Hamlen & Sons Co.* v. *Illinois Cent. R. Co.*, 212 Fed., 324, which was an action growing out of a transaction in which export bills of lading had been issued to cover shipments from a point in the United States to Buenos Aires, Argentine Republic, through the port of New Orleans, the court said at page 326:

The bills of lading expressly provide that the carrier issuing the same only issued them on its own behalf over its own lines, and as agent for the connecting lines, without a joint, but several, liability, and as the Carmack amendment applies only to transportation between the states, and not to foreign countries, the defendant is clearly not liable under the bill of lading, even if it had been the initial carrier which had issued the bill of lading, which it was not, * * *.

In its report in *The Cummins Amendment*, *supra*, page 693, the Commission held that the Cummins amendment did not apply to export and import shipments to and from foreign countries not adjacent to the United States for the reason that—

while specifically stating that its terms shall apply to property received for transportation from certain points to certain other points, it makes no reference to shipments from a point in the United States to a point in a nonadjacent foreign country, or from a nonadjacent foreign country to a point in the United States.

In *Brunswick-Balke-Collender Co.* v. *T., S. & M. Ry. Co.*, 44 I. C. C., 598, 600, property, which was delivered to the initial carrier for transportation from Muskegon, Mich., to Mexico City, Mexico, via inland carriers to New Orleans, thence via steamer to Vera Cruz, Mexico, was damaged by fire after loading on the steamer at New Orleans and before it left the dock. The Commission, having occasion to consider whether or not the Cummins amendment was applicable to the shipment, referred to the fact that the Carmack amendment mentioned only transportation "from a point in one state to a point in another state," and said:

This provision was extended by the Cummins amendment, effective June 2, 1915, so as to include and apply to property received for transportation "*from any point in the United States to a point in an adjacent foreign country.*"

* * * While it is true that this shipment moved from a point in one state to a point in another state of the United States in reaching the port of export its essential character was that of "foreign commerce," or *property received for transportation to an adjacent foreign country;* and that Congress did not regard the Carmack amendment as applicable to such shipments may be inferred from the fact above indicated that the provisions of that amendment were extended by the Cummins amendment to specifically apply to commerce to an adjacent foreign country.

Applying the rationale of these cases to the question before us, it seems evident that it was not the intention of Congress to make the Cummins amendment applicable to traffic to a nonadjacent foreign country. There is a clear distinction between "interstate" and "foreign" commerce in the wording of the act throughout, and in the definitions of the courts in construing these terms, whether or not the cases arise under the act to regulate commerce. Transportation in interstate commerce, as used in the act, means the transportation of commodities between, or among, the states, territories, etc. Transportation in foreign commerce, as used in the act, means the transportation of commodities between a point in the United States and a point in a foreign country.

The deduction seems clear and inevitable that transportation from a point in the United States to a point in a nonadjacent foreign country can not be brought within the specification of the Cummins amendment of commerce "from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country." For obvious reasons, not necessary to enlarge upon, it seems equally clear that commerce from a point in the United States to a point in a nonadjacent foreign country moving wholly intrastate from the point of shipment to a port of export is not within the purview of the amendment. This interpretation is supported by the holdings of the courts in *St. Louis, I. Mt. & So. Ry. Co.* v. *Starbird,* 243 U. S., 592, and *Aldrich* v. *Atlantic Coast Line R. Co.,* 104 S. C., 364.

NATURE AND FUNCTIONS OF THE EXPORT BILL OF LADING.

Considered as a receipt for the goods the export bill is substantially similar to the domestic bill. As a contract to transport, however, it has many points of difference. The undertaking with respect to transporting the property is that it is—

to be carried to the port (A) of * * *, and thence by to the foreign port (B) * * *, and to be there delivered in like good order and condition as above consigned, or to consignee's assigns, or to another carrier on the route to destination, if consigned beyond said port (B), * * *.

In consideration of the rate of freight herein named, it is hereby mutually agreed by each carrier, severally but not jointly, that the service to be performed by it hereunder shall be subject to the conditions not prohibited by law, whether printed

or written, herein contained, which are hereby agreed to by the shipper and by him accepted for himself and his assigns.

The form of signature on the proposed bill specifies that the agent for the carriers signs on behalf of them severally, but not jointly. The form also provides for signature by the shipper, or his agent; the declaration on behalf of the shipper being that "I (we) accept all the conditions of this bill of lading."

The shippers object not only to the proposal that the carriers shall be bound only severally, and not jointly, but also to the unconditional acceptance of all the conditions to which they are asked to subscribe. The through export bill of lading is not regarded by the Commission as a joint contract or undertaking for the through carriage of property from an interior point in this country to a foreign port, but merely as an instrument combining, for the convenience of the shipper, the separate and several contracts of the rail carriers to the American port and the ocean carrier beyond. *New York Produce Exchange* v. *B. & O. R. R. Co.*, 46 I. C. C., 666, 670. It must clearly separate the liability of the rail and ocean carriers and show the published rate of the inland carrier. The publication of such rate does not in any manner limit the very valuable privilege of through billing. *Cosmopolitan Shipping Co.* v. *Hamburg-Amer. Packet Co.*, 13 I. C. C., 266, 281.

The advantages of the through export bill to the shipper are important. Being a bill for through transportation, more favorable demurrage rules apply at the port than apply on domestic traffic. Moreover, if export traffic were moved to the port under a domestic bill of lading, the shipper would be obliged to take out a ship's bill of lading. This would often be a great disadvantage in financing his operations, for he could not draw a draft against his foreign customer until he had gotten his ship's bill of lading, whereas the through export bill may be negotiated immediately, as is the common custom.

In discussing the proposed export bill it is necessary, therefore, to keep in mind the limitations referred to, and also the advantages to the shipper and the commerce of the country in having a negotiable form of export bill.

CONDITIONS OF THE EXPORT BILL OF LADING.

The proposed bill contains the general condition that "any alteration, addition or erasure herein which shall be made without an indorsement hereon signed by the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor." This provision, concerning which there is no controversy, is in accordance with the provisions of section 13 of the bills of lading act.

Section 1, clause 2, differences in elevator weights.—By this section is provided that the carrier shall not be liable for "differences in he weights of grain, seed, or other commodities caused by * * * r discrepancies in elevator weights." This provision is identical ith that proposed in the domestic bill and considered *ante*. The easons which, in our judgment, required the condemnation of the ule there apply here, and it will be eliminated from the form to be pproved by us.

Section 1, clause 3, liability of carrier as insurer and warehouseman or loss, damage, or delay caused by fire.—This provision, likewise dentical with that in the domestic bill, reads:

For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive f Sundays and legal holidays) after notice of the arrival of the property at the port of xport has been duly sent or given, the carrier's liability shall be that of warehouseman nly.

For reasons there stated the phraseology prescribed in the domestic ill, with such modification as is appropriate to export traffic, should e employed in the export bill.

Section 1, clause 5, transportation in open cars.—This provision is dentical with that proposed to be inserted in the domestic bill and hich we there condemned. Although, for some reason, the provision in the export bill is not attacked as it was in the domestic ill, we conceive of no reason why it is any more defensible or justifiable here than in the domestic bill.

In part for the reasons stated in discussing its proposed insertion n the domestic bill, and further because we find that it would be njust and unreasonable, it will be eliminated from the export bill.

Section 2, clauses 1 and 2, agency of issuing carrier—proposed exemption of participating carrier for liability for loss, damage, or injury o property not occurring on its own line.—These two clauses, which must be considered together, provide:

In issuing this bill of lading this company agrees to transport only over its own line and acts only as agent with respect to the portion of the route beyond its own line. No carrier shall be liable for loss, damage, or injury not occurring on its own road r its own water line or its portion of the through route, nor after said property has been delivered to the next carrier.

The declared purpose of this section is to limit the contract of the issuing carrier to its own line, and to provide that no participating carrier in the through route shall be liable for loss, damage, or injury not occurring on its own portion of the route, or after the property shall have been delivered to the next connecting carrier. The carriers' contention, as stated on brief, is that the provisions of the Cummins amendment have no application to shipments carried under *this form* of bill of lading, as it is not used on shipments to adjacent foreign countries.

Such a limitation if included in a bill of lading issued to cover a shipment to a point in an adjacent foreign country would be unlawful and void under the terms of the Cummins amendment.

The shippers object to the retention of this clause in the bill and propose that the entire section shall be eliminated. The proposal of the shippers goes beyond the necessities of the situation, however, for while the carrier may not make such a limitation in respect of interstate traffic within this country, nor in respect of traffic to an adjacent foreign country, it may, in respect of export traffic to non-adjacent foreign countries, still enjoy its common law right to contract for such a limitation of its liability. Congress has not sought to take this right from it. While the carrier is bound to issue to the shipper a bill of lading on a shipment destined "from a point in the United States to a point in an adjacent foreign country," the law does not say that, in form, such a bill of lading shall be an "export" bill. We think, however, that the matter should be removed from the field of controversy by inserting, as a general condition of the bill of lading, supplementary to the one already referred to, the following:

This bill of lading is not to be used on traffic from a point in the United States destined to a point in an adjacent foreign country.

Section 3, clause 1, transportation to be only with reasonable dispatch unless by specific agreement indorsed on the bill.—Section 3, clause 1, reads as follows:

No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch unless by specific agreement indorsed hereon.

While no objection is raised to the provisions of this clause, we think that the reservation by the carriers of the right to grant expedited service by special agreement indorsed on the bill of lading, as contained in the words "unless by specific agreement indorsed hereon" is objectionable. Thus it would be possible for certain favored shippers through special indorsements on their bills of lading to secure special and expeditious handling of their shipments, possibly to the undue prejudice and disadvantage of their less favored competitors.

For this reason we are of the opinion these words should be eliminated.

Section 3, clause 3, measure of carrier's liability for loss or damage.—The carriers propose the following:

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if paid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or

tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

The shippers propose as a substitute for this provision the following:

The amount of any shortage (loss of property in whole or in part) for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, including freight charges, if paid; unless a lower value has been agreed upon or is determined by the classification or tariff schedule upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. And for any damage or delay to property transported hereunder, the amount shall be the loss sustained by the owner of the property by reason of said damage or delay.

It will be noted that the shippers' proposal differs from that of the carriers in only one material respect, namely, that in the event of damage or delay to property the amount of liability "shall be the loss sustained by the owner," which at common law is computed on the basis of the value at point of destination. However, as we have noted, the provisions of the Cummins amendment apply only to such export shipments as are destined to "a point in an adjacent foreign country." To shipments destined to a nonadjacent foreign country the provisions of this amendment do not apply, and our jurisdiction over the issuance, form, and substance of bills of lading covering such shipments is limited to the provisions which govern the inland or coastwise transportation to the port. It has been the practice of the carriers for many years to provide for the restriction of the amount of their liability to the value at point of origin in both their export and domestic bills of lading. They assert that the value at point of origin can be in most instances definitely and accurately determined, while the value at point of destination is often conjectural and inflated by anticipatory profits, involving frequent litigation in determining the measure of damages. We are of the opinion that the carriers' proposal in question is not shown to be unreasonable. However, we believe that the words "including loss or damage arising from delay" should be inserted after the word "damage" in the first line thereof, so that the same would read as follows: "The amount of any loss, damage, including loss or damage arising from delay, for which any carrier is liable, etc."

Section 5, clause 1, carrier's liability as warehouseman after 48 hours.—The purpose of this provision is to effect, or secure, to the carrier the same exemption or limited liability at port (A) that is sought to be obtained by the proposal in a corresponding section of the domestic bill heretofore discussed. The only difference in phraseology is that which makes the proposed provision appropriate to transportation to a port of export instead of other destination. The shippers propose with respect to this provision, as they did with

respect to the one in the domestic bill, that it be eliminated without substitution of any kind.

The theory upon which the shippers' objections to the condition here proposed are primarily founded is that the export bill is a joint and not several, contract on the part of the participating carriers for through transportation and that so regarded there can be no suspension or interruption of the transportation, and therefore no period of time at the port when neither the inland nor ocean carrier assumes the liability of a carrier for the protection of the property that is, that there can be no period of time during which both the inland and the ocean carrier may claim to be divested of liability other than that of warehouseman. But with this view we can not agree. The export bill is not a joint contract for through transportation from the inland point in this country to the foreign destination and the act to regulate commerce does not impose upon the carriers subject thereto any obligation to issue such a bill. The particular objections urged to the proposed condition are (1) that it tends to impair or destroy the negotiability of the bill; and, (2) (this is really involved in and constitutes in part the basis for objection (1) just stated), that in the event of delay or inability to deliver the shipment to the ocean carrier within the free time allowed by the inland carriers' tariffs the shipment may become subject to storage and other port charges which can not be definitely known to the shipper at the time he makes his sale or shipment, and which the foreign customer refuses to assume or pay if his contract of purchase is made c. i. f. It is also urged that the proposed section would adversely affect the insurance policies of the shipper, or would force the shipper to take special insurance. Witnesses testified in support of these objections.

We have considered the subjects of free time allowances, storage and other port charges in other cases. In *Export Freight Free Time*, 47 I. C. C., 162, decided November 12, 1917, we found that the carriers' proposal to reduce the free time allowed on export traffic from 15 days to 5 days at the north Atlantic ports and from 10 days to 5 days at the Gulf ports was not justified but that under the circumstances then existing the free time at the north Atlantic ports might reasonably be reduced to 10 days and at the Gulf ports to 7 days. In *New York Produce Exchange* v. *B. & O. R. R. Co.*, *supra*, decided October 1, 1917, we said with respect to the assessment of storage charges at the port of New York in cases where the time which elapsed between the arrival of an export shipment by rail and its delivery to the ocean carrier exceeded the free time allowance of 15 days that as a matter of law neither the rail nor the ocean carrier is liable for the storage charges at the port. And further, page 671:

The question whether such charges should be assessed is squarely presented and has been fully and thoroughly briefed and argued in No. 4844, *In the Matter of Bills of Lading*. Without prejudice to any conclusion that may be announced in that case, we hold upon this record that the assessment of such charges has been justified.

Neither upon the facts shown of record in this case, nor upon the arguments made thereon, can we find that the assessment of storage charges, *as such, under reasonable regulations*, is unjust or unlawful.

The proposed condition is, however, subject to this objection, that it undertakes to limit the carrier's liability to that of warehouseman only after 48 hours after its arrival at the port, and reserves the right, among other things, to remove it and store it in a public warehouse "at the owner's risk." For the reasons heretofore stated in connection with the domestic bill we must disapprove the proposed condition in these aspects.

The record does not show that the operation of the condition objected to seriously impairs, much less destroys, the negotiability of the export bill of lading. As the law now stands, carriers can not be required to issue a through export bill of lading to the foreign destination binding jointly upon them and subjecting them to the same limitations that the law imposes upon them in respect of the issuance of domestic bills of lading applicable on interstate traffic and on traffic destined to adjacent foreign countries.

We disapprove the condition as proposed, but we approve a condition reading as follows:

Property not removed by the exporting carrier, or the party entitled to receive it, within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at port (A) has been duly sent or given, and after placement of the property for delivery at port (A), or tender of the property for delivery upon order of the party entitled to receive it has been made, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to the carrier's responsibility as warehouseman, only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at port (A), or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Section 5, clause 2, receipt or delivery of property at private or other sidings, wharves, or landings, etc.—This clause, which is identical with a corresponding clause of the domestic bill, heretofore discussed, reads as follows:

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent, shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and, except in case of carrier's negligence, when received from or delivered on private or other sidings, or on such wharves or landings shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.*

The shippers object to the portion of the condition printed in italics and propose that it be eliminated without substitution. There is nothing of record to indicate that the objectionable part of the condition stated above is any more reasonable or defensible when applied to export traffic than when applied to domestic traffic. It seems to require no further consideration and for reasons already stated in discussing its proposed inclusion in the domestic bill we find here, as there, that the proposal expressed in italics is and would be unreasonable and should be omitted from the bill. It is therefore disapproved.

Section 9, clauses 1, 2, 3, 4, 5, and 6, limitations of liability of water carriers.—Since, as we have already held herein, the Cummins amendment does not apply to transportation from a point in the United States to a point in a nonadjacent foreign country, the carriers are not precluded from incorporating in the export bill of lading reasonable provisions applicable exclusively to water carriers. The shippers object to the incorporation of the proposed clause in the export bill upon the same grounds that they opposed its inclusion in the domestic bill. We need not repeat those arguments.

We have given consideration to the conditions and stipulations proposed by the carriers and to the objections and counter stipulations proposed by the shippers. We are convinced that many of the stipulations in respect of the water carriers' exemption from liability proposed in their behalf are unreasonable and indefensible, and, in many instances, in violation of the law. The objections of the shippers are in many cases ill considered and equally unreasonable. We think that reasonable conditions and lawful limitations of liability may with propriety and advantage be incorporated in the export bill, and upon consideration thereof we find that the following woul be just and reasonable:

SEC. 9. Except in case of diversion from rail to water route, as provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemption provided by statute and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, and assist vessels in distress, to

viate for the purpose of saving life or property, and for docking and repairs. Except case of negligence, such carrier shall not be responsible for any loss or damage to operty if it be necessary or is usual to carry the same upon deck.

If the shipowner shall have complied with the provisions of section 3 of the Harter , it is hereby agreed that the owners or consignees of the cargo shall contribute th the shipowner in general average, and shall pay any salvage or special charges operly incurred, even though the necessity for the sacrifice or expenditure was ought about by fault in navigation or management of the ship.

If the property is being carried under a tariff which provides that any carrier of rriers party thereto shall be liable for loss from perils of the sea, then as to such rrier or carriers the provisions of this section shall be modified in accordance with e tariff provisions, which shall be regarded as incorporated into the conditions of is bill of lading.

The term "water carriage" in this section shall not be construed as including hterage in or across rivers, harbors, or lakes, when performed by or on behalf of il carriers.

Section 10, clause 1, exemptions from liability for delay, and reduction f liability to that of warehouseman, while the property is awaiting rther conveyance.—Section 10, clause 1, as proposed by the carriers, eads as follows:

No carrier shall be liable for delay, nor in any respect other than as warehouseman, hile the property awaits further conveyance, and in case the whole or any part of the roperty specified herein be prevented by any cause from going from the port of xport in the first vessel of the ocean line for which intended leaving after arrival of ich property at the said port, the carrier hereunder then in possession is at liberty forward said property by succeeding vessel of said line, or, if deemed necessary, by ny other vessel.

The shippers object to the words italicized above and suggest their limination without any substitution in the place thereof. Their bjection is based upon the theory that as an export shipment is a hrough shipment from an inland point of origin to a foreign destination, necessarily requiring transportation over a part of the route by a foreign carrier, the contract of carriage is a joint and indivisible ne, instead of a separate and distinct contract on the part of each arrier participating in the transportation. However, as already tated, we are of the opinion that the provisions of the Carmack and Cummins amendments are inapplicable to export shipments destined to points in nonadjacent foreign countries, and it is only by the provisions of these amendments that carriers are prohibited from restricting their liability for loss, damage, or injury not occurring on their respective separate lines. In the absence, therefore, of any statutory provision, a carrier is within its legal rights in contracting against liability for a delay not occurring on its own line not the result of its negligence, and, where proper tender of a shipment has been made to a connecting line, to reduce its liability thereafter to that of a warehouseman for the period such shipment is awaiting further transportation. We are of the opinion that the words in italics are not illegal, but they are unreasonable in that they are

capable of an interpretation which would exempt all of the carriers from delay, however caused or wherever occurring. We find, therefore, that the following language should be adopted instead of that proposed by the carriers:

No carrier shall be liable for delay not occurring on its own line, or the result of its negligence, nor in any respect other than as warehouseman, while the property awaits further conveyance after proper tender of delivery to the next connecting carrier has been made, and in case the whole or any part of the property specified herein be prevented by any cause from going from the port of export in the first vessel of the ocean line for which intended leaving after arrival of such property at the said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding vessel of said line, or, if deemed necessary, by any other vessel.

Section 10, clause 2, termination of inland carrier's liability upon delivery made in accordance with existing arrangements at the port (A).—This clause reads as follows:

This contract is executed and accomplished, and all liability hereunder terminates upon the delivery of the said property to the exporting steamer, her master, agents, or servants, or to the exporting steamship company, *or subject to existing delivery arrangements, if any, on the pier usually used by the exporting steamer at the port of export, whether or not the same may be the property of or used as a warehouse by the inland carrier also,* and the inland freight and all other charges hereinbefore provided for shall be a first lien on the property, and shall be due and payable by the steamship company or vessel.

The shippers object to the provision stated in italics above, apparently on the theory that an interim might thereby be permitted during which no carrier would assume liability other than as a warehouseman. This does not necessarily follow. There are, of course, circumstances and conditions existing at some ports where there is necessarily an intermediary between the inland carrier and the ocean carrier. But the provision objected to relates to the local arrangement existing at some ports by which the inland carrier makes delivery to the ocean carrier and the latter accepts the shipment for further transportation. Obviously, when the inland carrier shall have made a proper delivery to the connecting ocean carrier, the former is relieved from and the latter assumes the carrier liability. Delivery by the inland carrier to the ocean carrier in accordance with the legal custom or usage of the port, or arrangement between them, implies acceptance of the goods by the ocean carrier. A case in point is that of *Washburn-Crosby Co.* v. *Boston & A. R. R.*, 180 Mass., 252, where a railroad company's pier was jointly used by it and a steamship company with which it formed a connection. The steamship company by an existing arrangement used and occupied a part of the pier for the purpose of receiving freight deposited upon it by the railroad company and intended for further transportation by the steamship line. It also appeared that the unloading of freight in such a manner was regarded by both companies

as a delivery to the steamship company. A quantity of flour which the railroad company had unloaded on the pier to await transportation by the steamship company was destroyed by fire. Suit was brought against the railroad company for its value, and the question was whether the facts showed a delivery. In deciding the question the court said:

> If, then, as might have been found, it was understood in advance that as soon as goods were left upon the wharf by the railroad the steamship company was free to take them at its pleasure and that it was expected to take notice of their presence and to assume responsibility for them without more special notification, the deposit of the flour on the wharf was an actual delivery without more.

It was held therefore that a delivery had been shown and that the railroad company was not liable. It by no means follows that the owner of the goods may not recover for the loss from the connecting carrier to whom they had been constructively delivered. He may pursue another in whom was the last actual possession. But if, as between the carriers themselves, the one to whom delivery has been constructively made for further carriage is the responsible party there is no reason why that carrier should not be liable also to the owner of the goods. *1 Hutch. Carr. (3d Ed.)*, §138.

As we understand the law, the carriers may properly contract for the exemption contemplated in this clause. It does not appear from all the record that it is in any wise unreasonable and it is therefore approved.

MISCELLANEOUS MATTERS.

At the inception of this proceeding and during its pendency, issue was made in respect to certain features of the negotiability or assignability of bills of lading. The enactment of the bills of lading act, 39 Stat. L., 538, comprehensively covers all these matters, we believe, and no disposition of them remains to be made in this report.

The question of time for filing claims and of notice of intent to file claims presented certain issues at the inception of the hearing. The Cummins amendment provides that—

> It shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however*, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as condition precedent to recovery.

Since the proceeding was instituted the carriers, at the suggestion of the Commission, have modified the rigor of their requirements in respect of such matters, and it is now provided in the proposed domestic bill of lading that—

> Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence,

as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export), or in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

The export bill provides that claims must be filed within nine months.

These seem to be reasonable provisions in respect to the time of filing claims and, so far as we are advised, they are not objected to by any of the shippers. There are now pending before the Commission formal complaints in two cases, *Price & Co.* v. *A., T. & S. F. Ry. Co.*, No. 8369, and *Blackburn & Co.* v. *A. A. R. R. Co.*, No. 8607, that were heard, briefed, and argued in conjunction with this proceeding. They involve certain issues with respect to transactions occurring before the carriers established the more liberal rules as to time. They will be disposed of in a separate report, and what is here said should be understood to be without prejudice to the disposition of those cases or any questions necessarily connected therewith.

As stated in an earlier part of this report, certain interests have advocated the prescribing of special forms of bills of lading for perishable products and for coal. We are not convinced, upon consideration of all the facts of record and the arguments made in advocacy of such bills, that they are essential. It is believed that the uniform bills prescribed will be adequate to care for any peculiar requirements of such traffic.

A uniform live stock contract will be prescribed in a supplemental report and order as soon as practicable after consideration of the record which has been more fully developed through the medium of a further hearing had with that purpose in view.

The Commission has not undertaken to deal with all the multiplicity of suggestions that have been made by the parties during the course of the hearing. A great many of them can not properly be made the subject of conditions in the bill of lading. Many others are matters of carriers' practices which they should henceforth conform to the rulings herein so far as the latter are applicable. Still others are or will become questions of interpretation.

An appropriate order will be entered in connection with this report prescribing the forms of domestic and export bills of lading which we find would be just and reasonable to be used upon the lines of all common carriers subject to the act who, together with the Director General of Railroads, have been heretofore served with notice and by due process have been made parties respondent herein.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of April, A. D. 1919.

No. 4844.

In the Matter of Bills of Lading.

It appearing, That by order made upon its own motion May 6, 1912, the Commission entered upon an investigation for the purpose of determining whether the rules, regulations, and practices in connection with the form and substance and the issuance, transfer, and surrender of bills of lading, the conditions contained therein, and other practices connected therewith are unjust, unreasonable, unjustly discriminatory, unduly prejudicial, or otherwise unlawful, and taking such action in connection with bills of lading as may be authorized by law to prevent further violations of the provisions of the act to regulate commerce, should any violations be disclosed by said investigation:

It further appearing, That due notice of the said proceeding of investigation and of the matters and things therein involved has been given to and served upon the Director General of Railroads and upon all common carriers, except express companies, engaged in the transportation of property by rail or by water subject to the act to regulate commerce, and the case having been fully heard and submitted by the parties, and full investigation of all the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, in which said report it is found, as more particularly set forth therein, that carriers parties to this proceeding have been and are at the present time maintaining and enforcing rules and regulations contained in their present bills of lading, and are engaging in practices thereunder, which are unjust, unreasonable, or otherwise in violation of certain provisions of the law as more particularly set forth in the said report, which said report is hereby referred to and made a part hereof:

And it further appearing, That the said report includes, and has appended thereto, two forms of bills of lading, referred to and designated in said report as Appendixes B and D, and that the Commission finds that the said forms of bills of lading would be just, reasonable, and lawful bills of lading to be used upon the lines of all said common carriers subject to the act to regulate commerce:

It is ordered, That Walker D. Hines, Director General of Railroa and all said common carriers subject to the act to regulate commer heretofore served with notice of this proceeding and parties thereto, and they are hereby, notified and required to cease and desist on before August 8, 1919, from using their present bills of lading the extent that the provisions and regulations contained therein inconsistent with or different from the provisions and regulati contained in the forms of bills of lading herein referred to and des nated as Appendixes B and D.

It is further ordered, That the said Walker D. Hines, Direct General of Railroads, and all said carriers subject to the act to reg late commerce, heretofore served with notice of this proceeding a parties thereto, be, and they are hereby, notified and required adopt and put in use on or before August 8, 1919, upon notice this Commission and to the general public by not less than 30 da filing and posting in the manner prescribed in section 6 of the to regulate commerce, and thereafter to use and employ, uniform when they issue bills of lading covering shipments, other than li stock, moving in interstate commerce, as required by and defined section 20 of the act to regulate commerce, the said certain forms bills of lading referred to as Appendixes B and D.

And it is further ordered, That this order shall continue in force a period of not less than two years from the date when it shall ta effect.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

WASHINGTON : GOVERNMENT PRINTING OFFICE

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EXHIBIT C.

Before the Interstate Commerce Commission.

In the matter of bills of lading.

Docket No. 4844.

Respondents' petition for reargument and for suspension of order.

Come now the respondents in the above entitled proceeding and file this their petition for reargument and for the suspension of the order entered by the Commission in this proceeding, and in support thereof, assign the following reasons:

1. The order entered by the Commission in this proceeding is not supported by evidence.

As the Commission itself states, at page 689 of its report,

99 "very little that can be accurately denominated 'evidence' in the true acceptation of the term" was submitted. Without such evidence it is, of course, incompetent for the Commission to condemn existing rules and regulations of the carriers governing their liability, except so far as such rules and regulations may be prohibited by law. The Commission has, nevertheless, without supporting evidence, undertaken to require the elimination of certain current provisions in the bill of lading and the modification of others, although its action in this regard is not founded on evidence adduced at the hearings, and although the provisions in question are not in conflict with any rules of law. The following disclose important instances of such action:

(a) The form of bill of lading ordered by the Commission for use in connection with domestic traffic would eliminate the long established exemption from liability on account of loss or damage due to riots or strikes. There is no rule of law which forbids such an exemption, since the carriers are not prohibited from exempting themselves from loss, damage, or injury to property except for such as is caused by them. Furthermore, the Commission itself admits that there was no evidence with reference to this feature of the situation. Thus the Commission says (page 705):

100 "Although the matter is not brought in issue, we are not satisfied with the carrier's claim of exemption, which is included in this clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for 'delay caused by riots or strikes,' as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable."

Moreover, as indicated in the Commission's report, not only was no objection made to this provision of the bill of lading but the shippers actually agreed to its inclusion in the bill, so that the

carriers had no reason to suppose that there was any necessity for introducing evidence in support of its reasonableness. However, the burden was not on them to support its reasonableness, but on those who questioned it to give evidence tending to show, if this could be done, that it was unreasonable. No such evidence was offered.

(b) In section 1 and section 4 of the forms proposed by the Commission for domestic and export traffic, the Commission undertakes to require the carriers to assume a carrier's liability as dis-
101 tinguished from that of a warehouseman, not merely for forty-eight hours after notice of arrival of property at destination has been sent or given but during the "free time" and after notice of arrival and placement of the property for delivery at destination or port of export, etc. While suggestions of this character were made by the shippers, no evidence was adduced tending to show that forty-eight hours after notice of arrival was an unreasonably short time for a continuance of the carrier's liability. On the contrary, this period of time is in excess of what would be required by law.

In many jurisdictions, following the rule of the Massachusetts courts, the carrier's liability as carrier terminates immediately upon the unloading of freight at destination. In other States the sending of notice to the consignee is not necessary to bring about the change. Even in States which require notice and a reasonable time for delivery such reasonable time does not extend for a period of forty-eight hours, exclusive of Sundays and legal holidays. Nor is there authority in the Federal decisions for the extension of the period.

Consequently the requirement of the Commission is not only without evidence to support it but would add a liability far in excess of the liability imposed by law and would tend to bring about
102 a varying and divergent period during which the liability as carrier would continue after the arrival of property at destination.

(c) No evidence was submitted to the Commission justifying elimination from the domestic bill of what has heretofore constituted section 2 of the conditions of the bill, i. e., the section restricting the liability of the initial carrier to its own line, except where the law provides otherwise. The existing provision is not in contravention of any rule of law, but, on the contrary, undertakes merely to provide that the applicable law in this respect shall govern the liability of the initial carrier.

(d) The Commission has undertaken to strike out the provisions of both the domestic and the export bill of lading terminating the liability of the carrier when shipments are delivered or received on private or other sidings after the cars have been detached from or attached to trains. While objections were made to this provision of the current bill, no evidence was given tending to show that the provision was unreasonable. With reference to a car placed

on a private siding, there is clearly nothing unreasonable or unlawful in the provision, since such placement constitutes delivery. With reference to cars placed on other sidings, such sidings, in accordance with judicial decision, must be interpreted as of the same
103 character as private sidings—in other words, a railroad siding which by its use is practically devoted to one consignee or a limited number of consignees. The placement of a car on such a siding should properly be regarded as a delivery, so as to bring about the termination of the carrier's liability. And the same considerations apply with respect to the receipt of the property.

Moreover, the Commission has admitted the propriety of the provision relating to the delivery of less-than-carload shipments at nonagency stations, whereas the provisions of the bill, as now drafted, would continue the carrier's liability for carload traffic at such stations. No such distinction is reasonable or just, and if such a rule is to be enforced, it will operate to discourage the establishment of nonagency stations, since the railroad could not undertake to police shipments at such points.

In addition, the current provisions of the bill of lading in this regard are not unreasonable, but merely serve to make certain the relation between the carrier and the shipper.

2. The order of the Commission enhances the liability which the carrier is required to assume beyond the liability which the law would establish in the absence of any limitations whatsoever in the bill of lading.

104 The Commission has required the assumption of liability in excess of the liability which the law would impose upon the carrier, although the Commission itself admits that it is without power to do this. Thus the Commission says at page 685 of its report:

"Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act."

This limitation upon the Commission's power (which is undoubted since it would require legislation to increase the liability of the carrier beyond the liability which the law has established) is disregarded in the following instance:

(a) In the requirement that the period during which the carrier's liability as carrier shall continue should be during the free time, as provided in the tariffs and until placement, etc. The law, as stated above, would establish a shorter period.

105 (b) In the requirement that section 2 be eliminated from the domestic bill. This section purports to give the carrier only the advantage of the existing rules of law.

(c) In the requirement of the concluding provision of the second paragraph of section 1 of both the domestic bill and the export bill, that where the carrier's liability depends on negligence, the burden to prove freedom from such negligence shall be on the carrier.

(d) In the requirement of section 7 of the proposed form for the domestic and export bills, that in certain instances the carrier shall forego its right to collect charges from the consignor.

(e) In the elimination from the bill of the current paragraph relative to the liability of the carriers by water.

The first and second of these proposed changes have been discussed above. With respect to the third and fourth, the carriers would have been willing to extend their common law liability in the one instance, and to have given up, in the other, under the circumstances stated, their right to collect charges from the consignor, but these concessions were predicated, as stated at the hearings, upon the acceptance of the other provisions of the bills as submitted by the carriers, and such other provisions having been modified, there
106 is now no justification for a demand that the carriers shall extend their liability beyond the liability created by law, or forego such rights as they otherwise have to collect their charges from the consignors.

The proposed elimination of the provision relative to the liability of water carriers would extend their liability far beyond the liability which the law has imposed upon them, and would deprive them of lawful contract liberties, besides prejudicing their rights under important Federal Statutes concerning shipping.

It must be remembered that the carriers are required in the first paragraph of section 1 of the conditions to assume liability for everything that occurs, except so far as the bill of lading itself may provide otherwise. Consequently, a water carrier would become liable, under this bill, to the same extent as a rail carrier. This is notwithstanding that Congress, in the Harter Act (February 13th, 1893), has specifically provided otherwise. The same may be said of the fire statute and the limited liability act of 1851. There was no evidence tending to show that any of the current provisions relating to the transportation of property by water were unreasonable. Indeed, these provisions are common to the bills of lading of all water carriers; many of them are of ancient origin and have been upheld by the courts time and again. None of these
107 provisions seek to relieve the carrier from the consequences of its negligence, because the provisions operate only in the absence of the carrier's negligence. It seems that the Commission is in error in suggesting that many of the current water provisions contravene the Cummins amendment. It is believed that the Cummins amendment does not create liability, but only prohibits limiting the damages payable after liability is found under lawful provisions of the bill of lading, irrespective of the amendment. When damage occurs by causes excepted in the bill of lading, without negligence

of the carrier, it is not caused by the carrier, which is the only situation to which the amendment applies. Without these provisions, of which all other water carriers have the benefit, the water carriers, subject to the act, would be at a very great disadvantage in operating their ships and service.

The Commission is here endeavoring to do what it itself has disclaimed the right to do, viz, to demand that the carriers shall assume a liability beyond the liability which the law would place upon them. In this instance the proposal is particularly open to criticism because it runs directly in the face of a well-defined national policy, as indicated by the above-named statutes and by common knowledge; viz, the necessity for a strong merchant marine.

108 3. The Commission's order should not require the elimination of the provision of section 3 of the current domestic bill of lading relative to the basis for the settlement of claims.

In view of the fact that the Commission has approved the inclusion in the export bill of the long-established provision relative to the basis for the settlement of claims, it is apparent that its condemnation of this provision in connection with the domestic bill is based upon its view as to the requirements of the Cummins amendment and not upon any belief that the provision is unreasonable. And this is in accord with prior decisions of the Commission. Moreover, the discussion of the question clearly indicates that the matter is being dealt with as a question of law.

Furthermore, the Commission has relied in large measure on a decision of a United States District Court, viz, the decision in M'Caull-Dinsmore Company vs. C. M. & St. P., 252 Fed., 664, whereas an appeal has been taken from that decision, and the case has been argued and is now awaiting disposition in the United States Circuit Court of Appeals for the Eighth Circuit.

The attention of the Circuit of Appeals has been called to the fact that the lower court erred in assuming that the common law
109 fixed destination value as the measure of liability, whereas the true rule was compensation excluding special or speculative damages.

Since the Commission's opinion seems to evidence uncertainty on its part as to the correct rule of law in regard to the matter, it is respectfully submitted that no change should be required in this feature of the bill of lading until the question of law is finally determined by the court. This for the following reasons:

(a) If a new rule of damage is made operative, there will be immediate uncertainties as to the proper basis of adjustment, since in many classes of claims it will prove of the utmost difficulty to determine new administrative rules for the ascertainment of value on bases other than those heretofore accepted as the proper bases for the settlement of claims. Questions will arise as to whether the value is to be determined with reference to the wholesale market

or the retail market; whether the value is to be determined at the car door at destination, or elsewhere, and how, as a practical matter, such value is to be determined at any point, etc., etc.

(b) Inevitably different methods of adjustment will be adopted which are certain to produce discriminations. Furthermore, there will be necessary delays because of the difficulty of adapting the practices of freight claim departments to an entirely new theory of adjustment.

110 (c) At the present time the practices of the freight claim departments are well worked out in their details and are well known to claimants, so that the adjustment of claims is proceeding with much greater expedition and justice than would be possible if the whole situation were to be thrown into a chaotic condition by the abandonment of present methods.

These results would be likely because of the Commission's intimations that destination value should govern in the absence of any specific provisions in the bill.

Because of these important practical reasons, it is respectfully submitted that the Commission should order no change in the bill, pending the final determination of the courts as to the validity of the provisions in question.

In addition, it is to be noted that the present provision is condemned in its entirety, whereas there is no possible ground for questioning its validity so far as it relates to the settlement of claims for loss, damage, or injury which are not caused by the carrier. There are many such, and the Commission's finding of illegality totally ignores the distinction made by the statute between loss, damage, and injury to the property caused by the carrier and loss, damage, and injury not so caused.

111 Finally, since the provision is condemned only because of the provisions of the Cummins amendment, there is apparently no reason to require its elimination as applied to intrastate traffic.

The respondents accordingly pray that the Commission allow a reargument of the questions involved in this proceeding, and grant leave for the filing of briefs in connection therewith; and that, pending such reargument and the determination by the Commission of the issues presented thereby, the Commission suspend the order heretofore entered by it in this proceeding.

And your petitioners will ever pray, etc.

R. B. SCOTT,
T. W. REATH,
R. H. HUPPER,
F. H. WOOD,
F. MARKOE RIVINUS,
HENRY WOLF BIKLÉ,
For Respondents.

R. V. FLETCHER,
Of Counsel.

112 United States District Court, Southern District of New York.

ALASKA STEAMSHIP COMPANY ET AL., PETITIONERS,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } E16—149.

A petition having been filed herein June 27, 1919, praying, among other things, for a preliminary injunction, it is

Ordered, that the hearing on said application for a preliminary injunction be, and hereby is, fixed for Thursday, July 3, 1919, at 10.30 a. m., in the Circuit Court of Appeals room, U. S. courthouse and Post Office Building, New York City.

[SEAL.]

H. G. WARD,
U. S. C. J.

NEW YORK, *June 27, 1919.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed June 27, 1919.

113 In the District Court of the United States for the Southern District of New York.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, et al., petitioners,
vs.
UNITED STATES OF AMERICA, RESPONDENT. } In Equity. E16—149.

To the honorable the judges of said court:

I hereby enter the appearance of the Interstate Commerce Commission as intervening respondent, and of myself as its counsel, in the above-entitled cause.

CHAS. W. NEEDHAM,
Counsel for the Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

WASHINGTON, D. C., *June 30, 1919.*

Filed July 1, 1919.

114 United States District Court, Southern District of New York.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship company, and others, petitioners,

v.

UNITED STATES OF AMERICA, RESPONDENT.

In Equity. No. 16—149.

Motion of the United States to dismiss the petition.

United States of America, respondent, by its counsel, now comes and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioners.

As grounds for this motion it is shown—

1. The petition is vague, indefinite, uncertain, and insufficient, in this, to wit:

(a) It does not contain a short and plain statement of the grounds upon which the court's jurisdiction depends as prescribed by Equity Rule 25.

(b) It does not appear from the face of the petition or otherwise that the court has jurisdiction to entertain the petition.

2. The petition and the exhibits attached thereto and made a part thereof is without equity on its face, and does not state any cause of action against the respondent, and the court may not grant the relief prayed or any part of the same.

3. The forms of bills of lading attached to the report of the Commission and made a part thereof are authorized by and are in accordance with the acts of Congress in such case made and provided.

114½ 4. In the absence of a certified copy of the record of the evidence and proceedings before the Interstate Commerce Commission, the presumption that the order rests on substantial evidence is conclusive as against the bare allegations of the petition.

5. The report of the Interstate Commerce Commission and order entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced on the issues made by the parties, and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

6. It appears from the petition and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended, was authorized by the acts to regulate commerce, and that it was regularly made and entered by the Commission in a proceeding properly pending and conducted.

7. The petitioners have not in and by the petition shown that in making the order the Interstate Commerce Commission transcended

the powers conferred upon it by the statute or violated any right of the petitioners protected by the Constitution of the United States or any other right of the petitioners over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the petition, more fully to be pointed out on the hearing hereof, respondent prays that its motion be sustained and for such other and further action as may be appropriate in the premises.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

FRANCIS G. CAFFEY,
United States Attorney,
Southern District of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed July 10, 1919.

115 United States District Court, Southern District of New York.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, et al., petitioners.	In Equity.
v.	No. E16—149.
UNITED STATES OF AMERICA RESPONDENT, INTERSTATE Commerce Commission, intervening respondent.	

Reply of the Interstate Commerce Commission.

Now comes the Interstate Commerce Commission, hereinafter called Commission, by its counsel, and says:

I.

That the petition herein does not present a justiciable issue triable by this court, in that it does not appeal in said petition that the Commission was without jurisdiction under the act to regulate commerce to enter the order complained of; that the petition does not show or allege that the Commission did not grant a full hearing to all parties, including the petitioners, in the proceeding before it before the entry of the order in controversy; that the petition does not show or allege any irregularity in the proceedings before the Commission prior to the entry of said order; that the petition does not set forth or allege any, or sufficient, facts tending to show that this respondent in the entry of the order in controversy acted arbitrarily or without substantial evidence to support said order; and that the petition does not allege or set forth any facts showing or tending to show the violation of any Constitutional right of the petitioners or

either of them or that the petitioners or either of them are entitl to the relief or any part thereof prayed for.

In consideration whereof this respondent moves the court dismiss the petition.

116 II.

The Commission, without waiving its objections and motion dismiss the petition, for answer to the petition and the seve paragraphs thereof says:

(1) Paragraphs I and II of the petition are admitted.

(2) Paragraph III of the petition is admitted in so far as it not in conflict with the terms of the order of the Commisison dat March 14, 1919, and the Commission states that the effective d of said order has been postponed until September 8, 1919.

(3) Answering Paragraph IV the Commission alleges that t questions whether the present bills of lading issued by the pe tioners or either of them, and the rules and regulations contain therein and the terms, conditions, and practices under existing t iffs and bills of lading of the respective carriers are administrati questions to be determined by the Commission, under the act regulate commerce as amended and are not justiciable questions this court; that said questions and the issues raised in this suit ha after full hearing of all the parties to this suit been determined the Commission as set forth in its said report order, a certif copy of which report and order is hereto attached marked Exhi A and made a part of this answer.

(4) Paragraphs V and VI of said petition state conclusions law, each of which the Commission denies.

(5) For answer to Paragraph VII and the several subdivisio thereof the Commission submits its said report and order and den the allegation contained therein that there was no evidence adduc at the hearing to support the findings of fact set forth in said repo

(6) For answer to Paragraph VIII the Commission submits report and order and denies each and every allegation in t

117 several subdivisions of said paragraph to the effect that t powers of this Commission are limited in the manner and the extent set forth in said paragraph.

(7) The allegations as stated in Paragraph IX of said petiti are denied.

(8) Paragraph X of said petition refers to an existing act of C gress, states petitioners' conclusions of law regarding said act, a contains an unsupported allegation that petitioners will be reme less; the Commission is advised that as to this paragraph no speci answers are required of this respondent.

(9) Paragraphs XI, XII, and XIII of said petition are, and e of them is, denied.

(10) The Commission avers that in the proceeding in which the said order was entered it had jurisdiction of the matters and things in controversy and that the petitioners and other interested parties were within the jurisdiction of the Commission in said proceeding; that the Commission proceeded in accordance with the provisions and requirements of the act to regulate commerce as amended; that there was substantial evidence, as will appear when a certified copy of the record thereof is presented to this court, to support its findings, conclusion, and order; that said order is binding and obligatory upon the parties; and that the petition herein does not set forth any facts or matters cognizable by this court showing or tending to show that said order violates any right guaranteed to the petitioners or either of them by the Constitution of the United States.

The Commission denies each and every justiciable allegation in said petition not herein expressly admitted or otherwise answered and denies that the petitioners, or either of them, is entitled to the relief prayed for in said petition or any part thereof.

118 The Commission prays that its motion to dismiss the petition may be granted with its reasonable costs and charges in this behalf sustained.

INTERSTATE COMMERCE COMMISSION,
By CHAS. W. NEEDHAM, *Its Counsel.*

P. J. FARRELL, *Of Counsel.*

119 DISTRICT OF COLUMBIA, *ss:*

Clyde B. Aitchison, being duly sworn, says that he is a member and chairman of the Interstate Commerce Commission and makes this affidavit on its behalf; that he has read the foregoing answer and knows the contents thereof; and that the same is true, according to his best knowledge and belief.

(Signed) CLYDE B. AITCHISON.

Subscribed and sworn to before me this 2d day of July, 1919.

[SEAL.] ALFRED HOLMEAD,
Notary Public.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed July 3, 1919.

(Here follows Exhibit A, not reprinted, being the same as Exhibit B. See side page 18.)

200 United States District Court, Southern District of New York

ALASKA STEAMSHIP COMPANY, CENTRAL OF Georgia Railway Company, Clyde steamship Company, Delaware, Lackawanna & Western Railroad Company, Delaware and Hudson Company, James H. Hustis, as temporary receiver of Boston and Maine Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Mallory Steamship Company, Merchants & Miners Transportation Company, The New York Central Railroad Company, New York, New Haven & Hartford Railroad Company, Norfolk & Western Railroad Company, Ocean Steamship Company of Savannah, Old Dominion Steamship Company, Pennsylvania Railroad Company, Rutland Railroad Company, Southern Pacific Company, Southern Steamship Company, Union Pacific Railroad Company, Yazoo and Mississippi Valley Railroad Company and others, petitioners,

against

UNITED STATES OF AMERICA, RESPONDENT, AND Interstate Commerce Commission, intervening respondent.

Opinion July 12, 1919, denying motion to dismiss petition and granting preliminary injunction.

Burlingham, Veeder, Masten & Fearey (Roscoe H. Hupper and Theodore W. Reath, of counsel) for petitioners (Ray Rood Allen, E. H. Boles, George F. Brownell, Francis I. Gowen, Albert H.
201 Harris, W. S. Jenney, Alexander R. Lawton, Blewett Lee, W. W. Myer, Thaddeus H. Swank, and F. H. Wood, on the brief).

Blackburn Esterline and Francis G. Caffey, for United States;

Charles W. Needham and P. J. Farrell, of counsel for Interstate Commerce Commission.

Before Ward, circuit judge, and L. Hand and Mayer, district judges.

WARD, *C. J.*:

This is a petition filed by common carriers wholly by railroad or partly by water under arrangements for a continuous carriage with common carriers by water for a decree setting aside an order of the Interstate Commerce Commission dated March 14, 1919, requiring them to use two certain bills of lading, one for domestic and the other for export transportation prescribed by the Commission.

The petitioners move for an injunction *pendente lite*.

The United States and the Interstate Commerce Commission move to dismiss the petition.

The only evidence before the court is the petition, the answer of the Interstate Commerce Commission and the report and order of the Commission.

The verified petition regarded as an affidavit and the answer of the Commission sufficiently raise the only question we shall consider, which is one of law.

Congress has unquestionably the power to declare what terms common carriers subject to the interstate commerce act of 1887 and its amendments may or may not insert in their bills of lading, and it has done so from time to time. For the purpose of this case we shall assume that Congress can delegate this legislative power to
202 the Interstate Commerce Commission, but we shall expect to find such delegation in clear and unmistakable language. Examination of the statutes does not convince us that Congress had any intention to confer upon the Commission the right to prescribe the terms of the carriers' bills of lading.

Section 1 as amended by chapter 309, laws of 1910, 36 Statutes at Large 539, paragraphed for greater clearness, requires all common carriers, subject to the act, to establish, observe and enforce:

1. "Just and reasonable classifications of property for transportation with reference to which rates, tariffs, regulations and practices are or may be made or prescribed."

2. "Just and reasonable regulations and practices affecting classifications, rates, tariffs, the issuance, form and substance of tickets, receipts and bills of lading * * * and all other matters relating to or connected with the reasonable handling, transportation, storing and delivery of property subject to the provisions of the act * * *."

"Every such unjust and unreasonable classification, regulation and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful."

It may be noted that the foregoing provisions apply to carriers only.

Section 15 prescribes the powers of the Commission in the premises, and not one word about contracts or the substance of bills of lading is used. The reference is only to rates, classifications, regulations or practices in connection with the receiving, handling, transporting, storing and delivery of property. The Commission is authorized "to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges to be thereafter observed in such a case as the maximum to be charged, and what individual or joint classification, regulation or practice is just, fair and reasonable to be thereafter followed, and to make

an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

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All this refers to rates, classifications, regulations and practices. That the Commission has power under section 12 of the act to investigate as to the fairness of the carriers' bills of lading we have no doubt, but we discover nowhere any authority conferred upon it to draw the carriers' bills of lading either in whole or in part. If they are in any respect unjust or unreasonable or unlawful the courts are open to the parties injured; if they contain any limitation of liability for loss or damage which Congress has declared to be void, the courts will say so. Missouri, Kansas & Texas R'y vs. Harriman, 227 U. S., 668.

The question is one of power to make the order and not one of its expediency. Therefore we shall not inquire whether the alterations the Commission has prescribed in the bills of lading are reasonable or not, because we think it has no power to make them. In any event, there was no power to prescribe an inland bill of lading in form or substance depriving the carriers of the benefits of the statutes limiting the liability of vessel owners and of the Harter Act. These statutes still survive unless repealed by implication and this result we are of opinion was neither intended nor accomplished.

Indeed, section 15 prescribes

"* * * nor shall the Commission have the right to establish any route, classification, rate, fare or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water."

204

The distinction between the power to make an order and the expediency of an order which the Commission has the power to make is stated in Interstate Commerce Commission vs. Illinois Central R'y Co., 215 U. S. at page 470, referred to with approval in Interstate Commerce Commission vs. Baltimore & Ohio RR Co., 225 U. S. at page 340.

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, (a), all relevant question of constitutional power or right; (b), all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, (c), a proposition which we state independently, although in its essence it may be contained in the previous one, viz, whether, even although the order be in form within the delegated power,

nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Telegraph Cable Co. vs. Adams, 155 U. S., 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order of what our conception as to whether the administrative power has been wisely exercised.

Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

All the petitioners are at present under Federal control except five of the water carriers. Of these the Clyde Steamship Company and the Mallory Steamship Company have their principal operating offices in the city of New York, and so has the Old Dominion Steamship Company, which is under Federal control. Of the railroads the New York Central has its principal office in this city. Therefore the jurisdiction of the court over the person
205 conforms to the requirements of chapter 32, laws of 1913, 38 Statutes at Large, 219. It is said that the petitioners, except the five water carriers above mentioned, are unaffected by the order because now in the actual control of the Director General of Railways. This control is expected to cease within the current year, and they will be subject to the order the moment their properties are returned to them whether the Director General complies with the order or not. If it was right to subject them presently to the order it is right that they should be allowed presently to dispute it, and we think there can be no doubt that the water carriers who can only escape from the order by withdrawing from joint arrangements with the land carriers and making entirely new dispositions and all the carriers who will be bound by it when their properties are returned to them will be subjected to damage irreparable within the meaning of the law. It would be impossible for the carriers in many cases to collect what they have paid out or lost if the Supreme Court were to hold that the order was not within the power of the Commission.

The motion to dismiss the petition is denied and the motion for a preliminary injunction is granted.

Judge Hand dissents in an opinion to be filed.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed July 12, 1919.

206 United States District Court, Southern District of New York

ALASKA STEAMSHIP COMPANY, CENTRAL OF Georgia Railway Company, Clyde Steamship Company, et al., petitioners,
against
UNITED STATES OF AMERICA, RESPONDENT, Interstate Commerce Commission, intervening respondent.

Dissenting opinion.

LEARNED HAND, *D. J.*: I own that had it not been for the conclusion of my brothers I should have thought the jurisdiction of the Commission beyond any question, but their decision, of course, shows that my certainty was wrong; and as the case will go up, it is fair to the respondents that I should state my reasons for a contrary conclusion. Under section one of the act to regulate commerce it is made the duty of all common carriers "to establish * * * just and reasonable regulations and practices affecting * * * the issuance, form, and substance of * * * bills of lading." I do not understand that any one questions that the duty imposed by this language upon carriers includes the subject matter which the Commission assumes to regulate in this case, and, indeed, I cannot see how any language could be more explicit than that which Congress has used. I may start, therefore, with the assumption that it is the duty of the
207 carriers to regulate in accordance with justice the form and substance of their bills of lading.

The issue in the case is whether the visitatorial powers of the Commission extend to such regulations, and this question is concededly to be determined by the language used in section fifteen, which reads as follows: "Whenever * * * the Commission shall be of opinion * * * that any * * * regulations or practices whatsoever of such carrier or carriers subject to the provision of this act are unjust or unreasonable * * * or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe * * * what * * * regulation or practice is just, fair, and reasonable to be thereafter followed and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist * * * and shall conform to and observe the regulation or practice so prescribed." It is quite true that this language does not specifically repeat all the subject matter of the duties imposed upon the carriers by section one, but it seems to me quite clear, if one reads the two sections in the light of their structural relation, that the Commission's jurisdiction under section fifteen is intended to be coextensive with the duties imposed upon the carrier under section one. Once the carriers act, the Commission, within the limits prescribed by law, is given power to examine their practices, correct them, and make them reasonable and lawful substitutes, which they are bound to follow. I do not quite see by what reasoning it is supposed

that the Commission under section fifteen is limited to supervision over rates or charges, in view of the mention not only of rates and charges but "any individual or joint classifications, regulations,
208 or practices whatsoever." While I prefer to rest my decision upon the general structure of the statute, rather than upon any specific language, the comprehensive intent is significant which is expressed by the words "practice whatsoever."

The Tank Car case, 242 U. S., 208, does not give any color to the petitioner's position. There the Commission tried to compel the roads to supply public tank cars, which necessarily involved an increase in their equipment, and the question involved was whether it was a "practice" within the meaning of section one to furnish or not to furnish them. Taken verbally alone, the language was not apt to express such an idea, and the consequence of the Commission's interpretation obviously put carriers within its control in a way which nothing else in the act indicated. The Supreme Court held that the Commission had not been authorized to require the roads generally to furnish new equipment to any extent that might be necessary. In the face of the explicit mention of bills of lading in section one the analogy of the case is not apparent.

As I think the Commission had power, therefore, to enter into the subject matter and prescribe legal and reasonable bills of lading, it becomes necessary to consider whether the bill of lading actually prescribed was valid in all its particulars. In the first place, I must assume on these motion papers that the decision of the Commission in all respects in which evidence might support it is properly supported, for, although the petition in some instances alleges that there was no evidence before the Commission justifying its finding, that allegation is denied and I must disregard it on motion for preliminary injunction. The question, therefore, simply is whether, in any instance, the decision of the Commission is such that it could be justified by no evidence whatever; in short, that it is contrary to law.

209 The first question is as to the elimination of the exemption for loss and injury due to strikes and riots, which the Commission struck out because it thought it illegal after enactment of the Carmack and Cummins amendments. Now, the Carmack amendment is not to be taken either as narrowing or widening the common-law duties of carriers. The petitioners suppose that the phrase "caused by it" narrowed those duties, but I cannot agree. It occurs in that part of the amendment which extends the liabilities of the initial carrier to the defaults of a connecting carrier and is used only as a convenient way of describing those liabilities. It was in no sense an effort to define anew the duties of the carrier, which the statute took over from the common law. This was the meaning of the Supreme Court, both in Adams Express Co. v. Croninger, 226 U. S., 491, 506, 507, and in Cincinnati, etc., Ry. v. Rankin, 241 U. S., 319, 326.

There would, indeed, be insuperable difficulties in construing the words otherwise. No one asserts that the phrase limits the liabilities of the carriers to losses positively caused by them, yet if it includes negligence on the theory that omissions may be the "cause" of loss, there is no warrant in the language used for saying that only such losses are "caused" by omission as are "caused by" the absence of reasonable care. If omission to prevent a loss be a cause of loss, then the loss is as much "caused by" the omission of any precaution whatever through which it might have been prevented as of reasonable precaution. Reasonable care has nothing to do with the carrier's duties, and the decision of the Supreme Court in Cincinnati, etc., Ry. v. Rankin, supra, is directly to that effect.

If, then, the Carmack amendment imposed upon the carriers their duties at common law, the second clause of that amendment
210 prohibits their exemption by contract from the duties so imposed, for the prohibition relates to "the liability hereby imposed." Before the Cummins amendment the Supreme Court had held in a number of cases that while the carrier could not exempt itself from liability, it might limit its amount, but the Cummins amendment, which took away that right, necessarily took from the carrier any modification whatever of its common-law duties. Nor is there anything in any of the decisions which seems to me to contradict that conclusion. Penn. R. R. v. Olivet Bros., 243 U. S., 574, only decided that the carrier was not liable for damages caused by delay, as indeed he was not at common law in any event, at least unless the delay was due to his negligence. That case is not in point for other reasons.

It therefore appears to me that the clause struck out by the Commission was illegal and it was not necessary that any evidence should be taken upon it. It was fairly within the scope of the order of May 6, 1912, which in most general terms invited reconsideration of the bill of lading as it then stood, and though the report of the Commission states that the matter was not in issue, there was no evidence which could have been material to the issue if one had been framed. I conclude, therefore, that the action of the Commission was right in this respect.

The second question at issue is the clause limiting the liability of the initial carrier to its own line when lawful. I do not find any such provision in the domestic bill of lading proposed by the carriers, but if it was there and was eliminated, I see no ground for complaint. The Carmack amendment expressly enacted the contrary, and there are no exceptions from it which could give any scope to the clause. The petitioners suggest that the carrier might be liable under the bill of lading for a default of the connecting carrier as warehouseman, except for the insertion of that
211 clause. If he were so liable, the clause would not protect him, for the Carmack amendment imposes the duty of warehousing in the terminal carrier as a part of "transportation," and as it im-

poses it, so also it forbids its exemption or limitation by amendment. In Cleveland, etc., R. R. v. Dittelbach, 239 U. S., 588, it was decided, although the contrary was the law of the State, that a limitation of liability in the bill of lading protected the terminal carrier while acting as warehouseman. This was before the Cummins amendment and while carriers could limit their liability. The theory of the case was that the Federal bill of lading covered the duties of warehousing as well as carrying. If so, when the Cummins amendment took away the right to limit, it necessarily affected the duties of warehousing, as the Carmack amendment had affected it before. The petitioners' suggestion is met by that case.

The next question is as to the liability for shipments delivered at private sidings. At worst the question was within the power of the Commission to determine in accordance with evidence. Prima facie, the carrier remains such after physical receipt and until he has delivered the goods, and in the absence of some agreement, it is not delivery to shunt cars upon a siding. It is doubtful whether the Commission has any power whatever to provide for the termination of such liability prior to actual delivery. But that question is not raised here.

The next question is as to the release of the consignor from liability for freight if delivered to him without requiring payment of freight. The illegality of the Commission's order in this respect is not strenuously urged. It seems to me so clearly within the purview of its powers that I think it unnecessary to discuss it in detail.

The next question concerns the provision that the carrier shall bear the burden of proof on all issues of negligence. The
212 petitioners assert that this changed their liability and is illegal on that account. A change in the burden of proof, however, has not been generally so regarded. As in the case of rules of evidence, Downs v. Blount, 170 Fed. R., 15, and of presumptions, Howard v. Moot, 64 N. Y., 262, the legislature may change the burden of proof even to affect existing rights and duties, Chandler v. Northrup, 24 Barb., 129, Wallace v. West N. C. R. R. Co., 104 N. C., 442. If so, the petitioners are wrong in supposing that a change in the burden of proof changes their liability. Rather it falls within the administrative powers of the Commission and it can hardly be suggested that justice does not require the carrier, who has all the information, to bear the burden of proof upon that issue.

The next question is of the valuation of the loss or injury at the place of origin. In most cases the actual value of the goods which the carrier must pay under the Cummins amendment would at common law have been determined at the place of destination. It is not necessary to say that this applies in all cases. At common law the carrier must pay for the actual value of the goods, and it might be urged that the Commission had done all that in any event it had the right to do when it struck out all mention of the subject from the bill of lading. I need not, however, go so far as this. It is possible

that the Commission might have found in the exercise of its administrative power that the valuation at the place of shipment, or at the place of destination, was a convenient regulation to compel the shipper to agree to. The only question here is whether it might leave it without any regulation at all.

The next provision is as to whether the carrier shall remain liable as such during "free time." Of the three rules under which termination of the carrier's liability is decided, that which
213 has by far the greater weight of authority is known as "the New York rule." I have found no Federal case upon the subject except Howe vs. The Lexington, 12 Fed. Cas., 661 (No. 6,767), an opinion of Judge Betts, which seems to follow the New York rule, which is also the English rule. As stated by Justice Lurton in Adams Express Co. v. Croninger, all the liabilities of the carriers are now to be determined by Federal law, and on a question like this, of general commercial law, we act in accordance with our own understanding. Under the "New York rule" the carrier must give notice to the consignee, when possible, and give him further a reasonable time to take away his goods, and if he fails, the carrier must put them in a safe place. These acts of the carrier are a substitute for actual delivery, which in the earlier cases he was charged to make. Now "free time" means that the carrier has no right to charge for care of the goods, because his carrier's charge covers the service, and as soon as he may charge for storage it would seem that those duties must have terminated. Prima facie, at least, the two periods are therefore cöextensive. This record does not contain any of the evidence on which the Commission based its findings, and I have nothing to go on, therefore, but presumption. Until the hearing I see no reason to disturb the finding or the order based upon it.

The final question is the elimination of the customary clauses which protect the water lines on the theory that the Carmack and Cummins amendments override the Harter Act and those other acts specifically affecting shipping. So far as concerns the statute limiting the liability of ship owners, it seems unnecessary to hold that the amendments have this effect. They only provide that the carriers may not exempt themselves from their duties by contract. While the carrier remains liable notwithstanding that contract, the extent of his liability is still subject to the provisions of all other
214 positive law. It is true, of course, that the result may be that the initial carrier is liable generally and has only a limited recourse over against the water carrier. If this be an injustice, it is one which arises from the liability statute and not from the Carmack and Cummins amendments.

As to the Harter Act, however, I can see no escape from the conclusion that there is a conflict between it and the amendments, in which the earlier statute must yield. But the petitioners argue that the last clause of the third paragraph of section fifteen shows that

the purpose was to leave water carriers subject only to the law applicable to transportation by water. The words are as follows: "Any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water." Now the act, with certain exceptions not necessary to consider, does not affect any transportation which is wholly by water, but only when partly by rail and partly by water (section one), and indeed, the clause just quoted from section fifteen immediately follows a provision, perhaps unnecessary, which denies power to the Commission to fix any rates for water transportation solely. But even textually the position of the petitioners is not sound, for the statute does not say that water transportation affected by the act shall be "subject only" to the laws applicable to the transportation by water. There is nothing exclusive in the language and the more natural interpretation of it would seem to be that it shall be "subject also" to the laws and regulations applicable to water transportation. Indeed, the language fits better with the purpose to make water law applicable wherever it does not conflict, than with the purpose to make it supersede the act.

Moreover, if one considers the effect of the interpretation which the petitioners desire, its meaning is much reinforced, for the act and its amendments were an elaborate effort to produce a com-
215 prehensive and equitable regulation of transportation, both by land and by land and water, and it can hardly be supposed that provisions like the Carmack and Cummins amendments were intended to subject railroads to one kind of obligation and the connecting water carriers to another. At least, no valid reason suggests itself for such a distinction when all had been free before those amendments to protect themselves in exactly the same way. It is true that the water carriers retain an advantage under the limitation act, but to hold that they may exempt themselves altogether is not only to give them discriminatory advantage without any reason, but is to subject the railroads to their liabilities without any recourse, because I do not see how the initial carrier on any hypothesis could protect himself from the default of the water carrier. In prescribing a unitary system for through transportation it seems to me hardly conceivable that Congress would have introduced without any apparent reason such inequalities as these.

In conclusion, therefore, I see no reason to hold that the Commission has exceeded its power in any part of what it did. It may of course transpire upon the hearing that some of the findings were without basis in evidence, and if so, the petitioners will have the advantage of that fact, but upon this record it is my opinion that no interlocutory injunction should issue.

The motion to dismiss the petition, however, should be denied.

LEARNED HAND, *D. J.*

Filed July 15, 1919.

216 *Order denying motions to dismiss and granting injunctions.*

At a stated term of the United States District Court for the Southern District of New York, held in the United States Courthouse and Post Office Building, borough of Manhattan, on the 2d day of August, 1919.

Present: Hon. Henry G. Ward, circuit judge; Hon. Learned Hand, district judge; Hon. Julius M. Mayer, district judge.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILway Company, Clyde Steamship Company, Delaware, Lackawanna & Western Railroad Company, Delaware and Hudson Company, James H. Hustis as temporary receiver of Boston and Maine Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Mallory Steamship Company, Merchants and Miners Transportation Company, The New York Central Railroad Company, New York, New Haven & Hartford Railroad Company, Norfolk & Western Railroad Company, Ocean Steamship Company of Savannah, Old Dominion Steamship Company, Pennsylvania Railroad Company, Rutland Railroad Company, Southern Pacific Company, Southern Steamship Company, Union Pacific Railroad Company, Yazoo and Mississippi Valley Railroad Company and others, petitioners,

against

UNITED STATES OF AMERICA, RESPONDENT, AND INTERstate Commerce Commission, intervening respondent.

In Equity. E16—149.

This cause came on to be heard at this term and was argued
217 by counsel, and thereupon, upon consideration thereof, it was order, adjudged, and decreed as follows, viz:

I.

That the motion of the United States of America, respondent, to dismiss the petition be and the same is hereby denied.

II.

That the motion of the Interstate Commerce Commission, intervening respondent, to dismiss the petition be and the same is hereby denied.

III.

That the application of the petitioners for a preliminary injunction be, and the same is hereby, granted, as prayed for in the petition, and that a preliminary injunction be and the same is hereby issued out of this court, restraining and suspending enforcement of the order of the Interstate Commerce Commission No. 4844,

In the matter of bills of lading," dated April 14, 1919, and entered at a general session of the Interstate Commerce Commission held at its office in Washington, D. C., April 14, 1919, prescribing two certain forms of bills of lading to be used by the Director General of Railroads and certain carriers, subject to the act to regulate commerce, until the final determination of this cause, and that the respondents and each of them, their officers, members, attorneys, agents, and employees, and any and all persons whomsoever, be and they are hereby enjoined and restrained from enforcing or in any manner attempting to enforce or carry out said order, or the terms thereof, until further order of this court.

H. G. WARD, *U. S. C. J.*
JULIUS M. MAYER, *U. S. D. J.*

[D–8864]
Filed Aug. 4, 1919.

18 United States District Court, Southern District of New York.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, Delaware, Lackawanna & Western Railroad Company, Delaware and Hudson Company, James H. Hustis, as temporary receiver of Boston and Maine Railroad Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, Mallory Steamship Company, Merchants & Miners Transportation Company, The New York Central Railroad Company, New York, New Haven & Hartford Railroad Company, Norfolk & Western Railway Company, Ocean Steamship Company of Savannah, Old Dominion Steamship Company, Pennsylvania Railroad Company, Rutland Railroad Company, Southern Pacific Company, Southern Steamship Company, Union Pacific Railroad Company, Yazoo and Mississippi Valley Railroad Company, et al, petitioners,

v.

UNITED STATES OF AMERICA, RESPONDENT, AND Interstate Commerce Commission, intervening respondent.

In Equity No. E–16–149.

Petition for appeal.

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the interlocutory order or decree of the District Court granting the preliminary injunction, entered August 4, 1919, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein the respondent and the intervening respondent consider the interlocutory order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

And the respondent and the intervening respondent pray that a transcript of the record, proceedings, and papers on which the interlocutory order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

FRANCIS G. CAFFEY,
United States Attorney,
Southern District of New York.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
CHAS. W. NEEDHAM,
Counsel for Interstate Commerce Commission.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 15, 1919.

219 United States District Court, Southern District of New York

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, et al, petitioners,
v.
UNITED STATES OF AMERICA, RESPONDENT, AND Interstate Commerce Commission, intervening respondent.
In Equity No. E–16–149.

Order allowing appeal.

In the above entitled cause, the United States of America, respondent, and Interstate Commerce Commission, intervening respondent, having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the District Court, granting the preliminary injunction, entered August 4, 1919, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of the court in such case made and provided:

It is ordered and decreed that the said appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

H. G. WARD,
United States Circuit Judge.
JULIUS M. MAYER,
United States District Judge.

(Endorsed:) U. S. District Court, Southern District of N. Y. Filed Aug. 16, 1919.

220 United States District Court, Southern District of New York.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, et al., petitioners.

v.

UNITED STATES OF AMERICA, RESPONDENT, AND INTERstate Commerce Commission, intervening respondent.

In Equity, No. E–16–149.

Assignment of errors.

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on the appeal to the Supreme Court of the United States from the interlocutory order or decree of the District Court granting the preliminary injunction, entered August 4, 1919, in the above-entitled cause.

The District Court erred:

I.

In holding and adjudging that the Interstate Commerce Commission was and is without power and authority after full hearing to enter the order in controversy, dated April 14, 1919, in the proceedings entitled "In the matter of bills of lading, No. 4844."

II.

In finding and deciding as follows:

"Section 15 shows the powers of the Commission in the premises and not one word about contracts or the substance of bills of lading is used. The reference is only to rates, classification, regulations, or practices in connection with the receiving, handling, transporting, storing, and delivery of property."

221 III.

In finding and deciding as follows:

"That the Commission has power under section 12 of the act to investigate as to the fairness of the carriers' bills of lading we have no doubt, but we discover nowhere any authority conferred upon it to draw the carriers' bills of lading either in whole or in part."

IV.

In finding and deciding as follows:

"We shall not inquire whether the alterations the Commission has prescribed in the bills of lading are reasonable or not, because

we think it has no power to prescribe an inland bill of lading in form or substance depriving the carriers of the benefits of the statutes limiting the liability of vessel owners and of the Harter Act. These statutes still survive, unless repealed by implication, and this result we are of opinion was neither intended nor accomplished."

V.

In entering the following decree:

"That the application of the petitioners for a preliminary injunction be, and the same is hereby granted, as prayed for in the petition, and that a preliminary injunction be, and the same is hereby, issued out of this court, restraining and suspending enforcement of the order of the Interstate Commerce Commission No. 4844, 'In the matter of bills of lading,' dated April 14, 1919, and entered at a general session of the Interstate Commerce Commission held at its office in Washington, D. C., April 14, 1919, prescribing two certain forms of bills of lading to be used by the Director General of Railroads and certain carriers, subject to the act to regulate commerce, until the final determination of this cause, and that the respondents and each of them, their officers, members, attorneys, agents, and employees, and any and all persons whomsoever, be and they are hereby enjoined and restrained from enforcing or in any manner attempting to enforce or carry out said order, or the terms thereof, until further order of this court."

VI.

In entering the interlocutory order or decree and granting the preliminary injunction enjoining the order of the Interstate Commerce Commission entered April 14, 1919, in proceedings entitled "In the matter of bills of lading, No. 4844," and suspending
222 the force and effect of the same, for that the petition of the petitioners (a) does not set forth any cause of action and is insufficient to warrant the granting of the preliminary injunction or to form the basis for any relief from the order; (b) nor have the petitioners shown that there is any equity in the petition on which to grant the preliminary injunction or to form the basis for any relief from the order; (c) nor have the petitioners shown that in making the order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred on it by the act to regulate commerce; (d) nor have the petitioners shown that in making the order the Interstate Commission violated any right of the petitioners protected by the Constitution of the United States, or any other right of the petitioners over which the court may exercise jurisdiction.

VII.

In entering an interlocutory order or decree and granting the preliminary injunction broader in terms and effect than the case alleged and the relief prayed in the petition.

VIII.

In not finding and deciding that the Commission had full power and authority to conduct the investigation in the manner and form in which it was conducted and that the order entered by it was within its power.

IX.

In not denying the application for preliminary injunction and dismissing the petition.

X.

In overruling the motion of the United States to dismiss the petition on the various grounds set forth in the motion, and in not sustaining the motion.

223 XI.

In overruling the motion of the Interstate Commerce Commission to dismiss the petition on the various grounds set forth in the motion, and in not sustaining the motion.

Wherefore, respondents and each of them pray that the interlocutory order or decree of the District Court, granting the preliminary injunction, entered August 4. 1919, be reversed, annulled, and set aside, with directions that the motions to dismiss the petition should be sustained and the petition dismissed, and for such other and further order as may be appropriate.

FRANCIS G. CAFFEY,
United States Attorney, Southern District of New York.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

CHAS. W. NEEDHAM,
Counsel for Interstate Commerce Commission.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 15, 1919.

224 *Citation on appeal.*

UNITED STATES OF AMERICA, *ss:*

To Alaska Steamship Company; Central of Georgia Railway Company; Clyde Steamship Company; Delaware, Lackawanna & Western Railroad Company; Delaware and Hudson Company; James H. Hustis as temporary receiver of Boston and Maine Railroad

Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; Mallory Steamship Company; Merchants & Miners Transportation Company; the New York Central Railroad Company; New York, New Haven & Hartford Railroad Company; Norfolk & Western Railway Company; Ocean Steamship Company of Savannah; Old Dominion Steamship Company; Pennsylvania Railroad Company; Rutland Railroad Company; Southern Pacific Company; Southern Steamship Company; Union Pacific Railroad Company; Yazoo and Mississippi Valley Railroad Company; and others, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Southern District of New York, wherein United States of America and Interstate Commerce Commission are appellants and you are appellees, to show cause, if any there be, why the interlocutory order or decree granting the preliminary injunction entered against said appellants in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry G. Ward, United States circuit judge, the Honorable Learned Hand, and the Honorable Julius M. Mayer, United States district judges, this 15th day of August, 1919.

H. G. WARD,
United States Circuit Judge.

[SEAL.]

JULIUS M. MAYER,
United States District Judge.

225 Service of a copy of the within citation is hereby admitted and acknowledged this 16th day of August, 1919.

BURLINGTON, VEEDER, MAHER, AND PEAREY,
Solicitors for all Appellees.

226 (Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 27, 1919.

227 United States District Court, Southern District of New York.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, et al., petitioners,	In Equity.
v.	No. E–16–149.
UNITED STATES OF AMERICA, RESPONDENT, AND Interstate Commerce Commission, intervening respondent.	

Præcipe for record.

To the clerk:

You will please prepare and certify a transcript of the entire record in the above entitled cause to be filed in the office of the clerk of the Supreme Court of the United States, on the appeal from the interlocutory order or decree of the District Court, granting the preliminary injunction, entered August 4, 1919, and include in said transcript all of the pleadings, exhibits, notices, appearances, motions, orders, decrees, journal entries, appeal papers, and any other papers on file or of record in said cause.

FRANCIS G. CAFFEY,
United States Attorney, Southern District of New York.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
CHAS. W. NEEDHAM,
Counsel for Interstate Commerce Commission.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Aug. 16, 1919.

228 Equity Docket 16—149.

ALASKA STEAMSHIP COMPANY, CENTRAL OF Georgia Railway Company, Clyde Steamship Company, and others, petitioners,	Burlingham, Veeder, Masten & Fearey, 22 William St.
vs.	
UNITED STATES OF AMERICA, RESPONDENT.	Chas. W. Needham, Washington, D. C.

1919.

June 27. Filed præcipe and petition to set aside order of Interstate Commerce Commission and for preliminary injunction and exhibits (paper).

June 27. Filed order that hearing on application for injunction be fixed for July 3/19, in C. C. A. room.

July 1. Filed appearance of C. W. Needham.

July 3. Filed reply of Interstate Commerce Commission and exhibit (paper).

July 3. Motion before Ward, Mayer and L. Hand, *J. J.* Motion argued and submitted.

July 10. Filed motion of the U. S. to dismiss the petition.

July 12. Filed opinion, Ward, C. J. "The motion to dismiss the petition is denied and the motion for a preliminary injunction is granted. Judge Hand dissents in an opinion filed."

July 15. Filed dissenting opinion, L. Hand, J.

Aug. 4. Filed order denying motion to dismiss and granting motion for injunction.

Aug. 15. Filed assignment of errors, petition for appeal.
Aug. 16. Filed præcipe for record.
Aug. 16. Filed order allowing appeal.
Aug. 27. Filed citation, H. G. Ward, J., and J. M. Mayer, *J.*

229 United States of America, Southern District of New York, ss:

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA Railway Company, Clyde Steamship Company, et al., petitioners, appellees,

vs.

UNITED STATES OF AMERSCA, RESPONDENT, AND INTERstate Commerce Commission, intervening respondent, appellants.

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 4th day of September, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-fourth.

[SEAL.] ALEX GILCHRIST, Jr., *Clerk.*

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United States Supreme Court. Alaska Steamship Company, Central of Georgia Railway Company, Clyde Steamship Company, et al., petitioners-appellees, vs. United States of America, respondent, and Interstate Commerce Commission, intervening respondent, appellants. Transcript of record. Appeal from the District Court of the United States for the Southern District of New York. Supreme Court, U. S. Office of the clerk. Received Sep. 9, 1919.

(Endorsement on cover:) File No. 27296. S. New York, D. C. U. S. Term No. 541. United States of America and Interstate Commerce Commission, appellants, vs. Alaska Steamship Company, Central of Georgia Railway Company, Clyde Steamship Company, et al. Filed September 9, 1919. File No. 27296.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants, *v.* ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, et al.	No. 541.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of appellants and respectfully moves the court to advance this case for argument on an early day of the present term convenient to the court.

This is a suit by the appellees to enjoin, set aside, and annul an order of the Interstate Commerce Commission, dated March 14, 1919, requiring appellees to use two modified forms of bills of lading, one for domestic and the other for export transportation. This order was entered by the Commission after a full

142054—19

hearing in a proceeding before it entitled *In the matter of bills of lading*, No. 4844, in which proceeding the appellees, with other common carriers and the Director General of Railroads, were defendants.

The Commission having found that certain provisions in the bills of lading then in use were unjust, unreasonable, or otherwise in violation of the act to regulate commerce, as amended, entered the above-mentioned order, whereupon this suit was brought in the United States District Court for the Southern District of New York. The case was duly heard before Circuit Judge Ward and District Judges Mayer and Learned Hand, upon a motion to dismiss the petition filed by the appellants and a motion by appellees for a preliminary injunction.

The judges entered an order denying the motion to dismiss and granting the application of the appellees for a preliminary injunction. An opinion by Circuit Judge Ward, concurred in by District Judge Mayer, and a dissenting opinion by District Judge Hand were filed and are a part of the record. The majority of said court held that while Congress unquestionably has the power to declare what terms interstate carriers may or may not insert in their bills of lading, it has not conferred such power upon the Commission. Judge Hand, in his dissenting opinion, contended that such power is conferred by sections 1 and 15 of the act to regulate commerce.

The question involved is of general public importance, affecting a vast number of daily trans-

actions between carriers and shippers throughout the United States, and should be settled as promptly as possible. Moreover, the case is one the expediting of which is provided for by the so-called Expediting Act, 32 Stat. 823, as amended by the act of June 25, 1910, 36 Stat. 854.

Opposing counsel have been notified.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

O

United States Supreme Court

OCTOBER TERM, 1919.

No. 541.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellants,

—against—

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *et al.*,

Appellees.

MEMORANDUM FOR APPELLEES ON MOTION TO ADVANCE.

Whether the hearing shall be advanced rests wholly in the discretion of this Court. There appears to be no statutory provision for expediting the case here. The Expediting Act (32 Stat. 823, 36 Stat. 854) provides only for expediting such causes in the lower court. The Commerce Court Act of June 18, 1910 (36 Stat. 542, Sec. 2) provided that appeals to this Court "shall have priority in hearing and determination over

all other causes, except criminal causes." But that Act was repealed in 1913, and the jurisdiction of the Commerce Court was given to the District Court under the District Court Jurisdiction Act (38 Stat. 219, 220), which provided for expediting such cases in the District Court, but did not re-enact the Commerce Court Act provision with respect to expediting appeals in this Court.

We doubt whether any public interest requires that this appeal be dealt with out of its regular course. The bill of lading which the Interstate Commerce Commission prohibited by its order of April 14, 1919, has been used by the carriers for many years, supposedly not in conflict with the law, and with the approval of the Commission. As to water traffic, it conforms with the Harter Act (27 Stat. 445), the Fire Statute (R. S. 4282) and similar legislation. If it contains any improper provisions both shippers and carriers have the protection of the courts with respect thereto, and shippers' interests are in nowise endangered by this appeal awaiting its turn.

The orderly course of the proceeding before the Commission does not suggest the need of haste. The Commission made a report on bills of lading in 1908 (14 I. C. C. 346), and the continued inquiry which culminated in the order of April 14, 1919 (52 I. C. C. 671) was instituted by the Commission's order of May 6, 1912.

The order under review affects all the railroads and every important inland and coastwise water line of the country. The railroads and some of the water lines are still under Federal control, and operated by the Director General of Railroads. They are nevertheless bound to protect

their rights, and it would seem proper that they be afforded the opportunity to do this after their properties are released from Government control and more normal conditions are restored out of the disorganization which now exists in various departments.

It is respectfully submitted that the motion to advance be not granted.

THEODORE W. REATH
ROSCOE H. HUPPER
Of Counsel for Appellees

October 20, 1919

No. 541.

In the Supreme Court of the United States.

October Term, 1919.

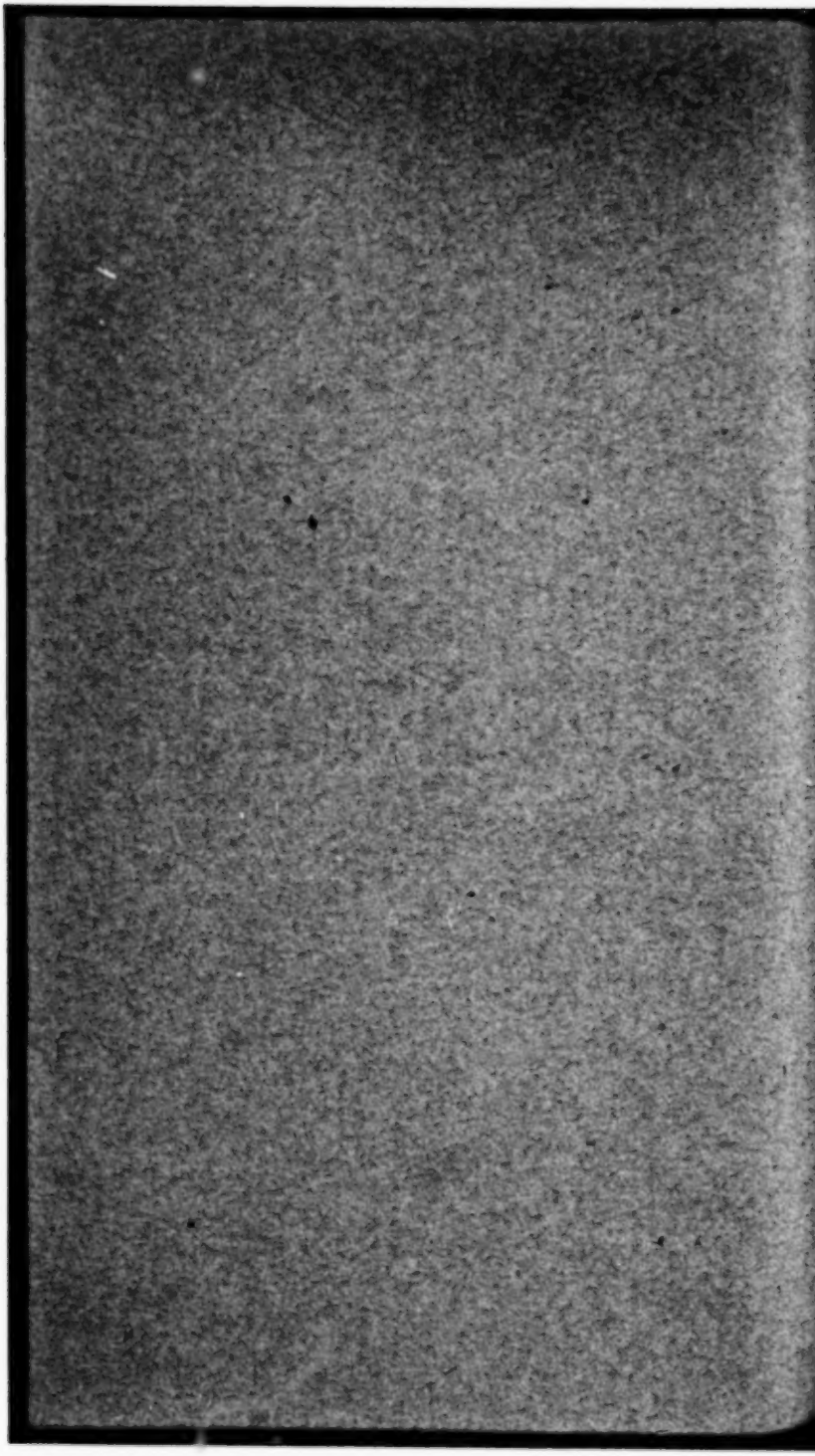
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS.



CONTENTS.

In the Supreme Court of the United States.

October Term, 1919.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants, v. ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, et al.	No. 541.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASE.

This is a suit in equity brought by the appellees (hereafter called plaintiffs) to enjoin, set aside, and annul an order of the Interstate Commerce Commission, dated April 14, 1919, requiring plaintiffs to use two modified forms of bills of lading, one for domestic and the other for export transportation of merchandise.

ALLEGATIONS OF THE PETITION.

The petition alleges, in substance, that plaintiffs are common carriers by railroad and common carriers by inland waterway and sea. The rail carriers are the

owners of railroads, engaged in interstate commerce, now under Federal control. The water carriers are engaged in water transportation under a common control, management, or arrangement for a continuous carriage or shipment in connection with rail lines. Certain of said water lines are also under Federal control. (Rec. 2.)

On May 6, 1912, the Interstate Commerce Commission instituted, under its docket No. 4844, a proceeding entitled *In the Matter of Bills of Lading.*

Notice of the proceeding having been served on plaintiffs and other common carriers subject to the act to regulate commerce, the Commission on sundry dates took testimony, received briefs, and heard arguments. On April 14, 1919, the Commission issued its report in said proceeding, which was also duly served on plaintiffs, and other common carriers, subject to said act and the Director General of Railroads. (Rec. 2-4.)

By its report the Commission found that the common carriers parties to the proceeding have been, and are maintaining and enforcing rules and regulations contained in their present bills of lading, and are engaging in practices thereunder, which are unjust, unreasonable, or otherwise in violation of law. The Commission, therefore, ordered and directed that said common carriers, and the Director General of Railroads, on or before August 8, 1919, cease and desist from using their present bills of lading to the extent that the provisions and regulations contained therein

are inconsistent with or different from those contained in the forms of bills of lading annexed to the report marked Appendixes B and D, which two forms the Commission found would be just, reasonable, and lawful bills of lading. (Id.)

Plaintiffs deny that they have been or are maintaining and enforcing rules and regulations contained in their bills of lading or are engaging in practices thereunder, which are unjust, unreasonable, or otherwise is violation of law; and they aver that the Commission is not authorized by the act to regulate commerce or any other law to make the order in question; that neither said act nor any other law imposes on them the obligation to issue bills of lading in the form prescribed; that the provisions which are directed to be stricken out are not in conflict with any rules of law, and that the Commission acted without supporting evidence. (Rec. 4-5.)

The following are alleged to be instances of action by the Commission in promulgating the domestic bill of lading without authority of law:

> (*a*) The form of domestic bill of lading ordered by the Commission would eliminate the provision of the existing bill which exempts the carriers from liability on account of loss or damage due to riots or strikes, and would limit that provision to delay as distinguished from loss through those causes.
>
> (*b*) Section 1 and section 4 of the forms of bill of lading ordered by the Commission for domestic and export traffic require the carriers

to assume *carrier* liability as distinguished from that of *warehouseman* for 48 hours after notice of arrival of property at destination and also during free time and after notice of arrival and placement.

(*c*) The order eliminates from the domestic bill section 2 limiting the liability of the initial carrier to its own line except where the law provides otherwise.

(*d*) The order strikes from the domestic and export bills of lading the provision which terminates liability when shipments are delivered or received on private or other sidings after the cars have been detached from or attached to trains. (Rec. 5–6.)

It is further alleged that the order in question increases the liability which the carriers are required to assume beyond the liability which the law would establish in the absence of any limitation in the bill of lading, as follows:

(*a*) In requiring both in the export and domestic bills of lading prescribed that the period during which the carrier's liability shall continue *as a carrier* is extended to include the entire free time allowed by the tariffs.

(*b*) In the requirement in the concluding provision of the second paragraph of section 1 of the domestic and export bills that where carrier liability depends on negligence, burden to prove freedom from negligence shall be on the carrier.

(*c*) In the requirement that the consignor shall be relieved from liability for freight

charges where the consignor stipulates that the carrier shall not make delivery without requiring payment of such charges, and the carrier shall nevertheless make delivery without requiring such payment.

(*d*) In the elimination from the bills of lading in current use of the provision (section 9) relative to the liability of carriers by water, thus requiring carriers to undertake carriage by water under greater liability than is prescribed by the common law and the statutes of the United States. (Rec. 6–7.)

Finally, it is alleged that the Commission's order is unlawful in attempting to require the elimination from the domestic bill of the customary provision for establishing the actual value of the property at the place and time of shipment as the basis for the settlement of claims for loss or damage; and that the order as a whole deprives plaintiffs of their property without due process of law, is without lawful warrant, and is in violation of the fifth amendment to the Constitution.

PROCEEDINGS BEFORE THE COMMISSION.

Efforts have been made by carriers for some years to bring into general use uniform bills of lading. These efforts met with some success, and in November, 1904, the Interstate Commerce Commission, acting upon numerous complaints from shippers, instituted a general inquiry into certain proposed changes in the provisions of bills of lading in use by carriers. The main object of this investigation was to formulate

a just and reasonable uniform bi be used by all carriers subject to the act to regulate commerce. Extended hearings were had and in June, 1908, the Commission filed its report. (*In the Matter of Bills of Lading*, 14 I. C. C. 346.) At that time there was no express provision in the act to regulate commerce making it the duty of carriers to establish "just and reasonable regulations and practices effecting * * * the issuance, form, and substance of tickets, receipts and bills of lading." The Commission in that report said (p. 349):

> we do not attempt to go further at this time than to approve of what may be called a standard bill of lading.
>
> Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority. Moreover, the situation makes no demand for a positive direction.

As a result of that decision the uniform bill of lading, approved by the Commission, has been adopted and put into use by very many of the railroad systems of the United States.

Since the report above referred to Congress has legislated upon the subject of bills of lading, by amending the substantive law in section 1 of the act to regulate commerce, and in other acts which will be hereafter referred to. After these amendments of the law many complaints were m the Commission, to the effect that certain provisions in the uniform bill now in use were in conflict with recent legislation,

and were unjust and unreasonable and therefore unlawful. The Commission, therefore, upon its own motion and in extension of the former proceeding—as authorized by section 15 of the act to regulate commerce—instituted a further investigation into the practices of carriers with respect to the issuance, forms, and substance of bills of lading in use. The order was entered May 6, 1912, and, in part, reads as follows (*Report of the Commission herein*, p. 687, Rec. p. 27):

> For the purpose of determining whether the rules, regulations, and practices in connection with the issuance, transfer, and surrender of bills of lading, the conditions contained therein and other practices connected therewith are unjust, unreasonable, unjustly discriminatory, unduly preferential, or otherwise unlawful, and taking such action in connection with bills of lading as may be authorized by law to prevent further violations of the provisions of the aforementioned statutes, should any violations be disclosed by said investigation.
>
> *It is further ordered*, That a copy of this order be served upon each carrier subject to the act to regulate commerce.

The notice was served upon the carriers named and shippers were invited to appear and be heard. A list of the carriers, including the appellees, the Director General of Railroads, shippers, state boards of railroad commissioners, associations, and boards of commerce which appeared and took part in the investigation is

given at the beginning of the Commission's report on pages 672 to 676, inclusive.

At the hearing the carriers presented and proposed for approval the uniform bills in use with some modifying clauses. The shippers and others objected to certain provisions in the bills proposed. The manner of procedure is set forth in the report. It began with a conference, under the auspices of the Commission, between representatives of various classes of shippers and a committee appointed by the carriers. Regarding this meeting, the Commission says (Report, p. 688):

> As a result of this conference many differences of opinion, manifested in the outset, in respect to many of the provisions proposed by the respective parties to be incorporated in the uniform domestic and export bills of lading, were either harmonized or brought to clearly defined issue. The forms showing the provisional conditions agreed upon and those as to which agreement could not be reached have been printed by the Commission (Appendixes A and C), and by common consent have been accepted by all parties as working models for the domestic and export bills that shall finally be recommended (Appendixes B and D). The phraseology of the conditions as to which agreement could not be reached are printed in underscored italics and the shippers' counter proposals, where any were made, are printed in a parallel column in black-face type on the back of the form. This mechanical arrangement facilitates the reference to the phrase-

ology and language as to which the differences of opinion still exist.

These appendixes are at the conclusion of the Commission's report and the italicized portions show the clauses which were at issue before the Commission for determination. A large amount of evidence was taken upon these issues, where testimony could throw any light upon them; briefs were filed, and much time given to oral arguments. There is no charge that the parties were not accorded a full hearing by the Commission. After due consideration the Commission filed its report in writing, finding that certain provisions in the bills of lading presented by the carriers, to be used in domestic and export transportation, were unjust, unreasonable and unlawful, and entered the order in controversy. By this order the carriers are required to cease and desist, on or before August 8, 1919, from using the forms in use and are directed to adopt and put into use the modified forms prescribed by the Commission.

What the Commission did, and what it claims it had the right to do, was to take the forms of bills of lading in use and proposed by the carriers, and, considering objections to specific clauses, rules, and regulations contained therein or proposed by the carriers, to determine whether such clauses, or any of them, were unlawful under the Act to regulate commerce, and, if so, to prescribe what would be just and reasonable rules, regulations, conditions or requirements to be inserted in lieu of the ones found

to be unlawful, and to direct the carriers to adopt and use the modified forms.

PROCEEDINGS IN THE DISTRICT COURT.

The case was heard in the district court before Ward, circuit judge, and L. Hand and Mayer, district judges, upon a motion by the appellees for an injunction *pendente lite*, and motions by the United States and the Interstate Commerce Commission to dismiss the petition. The only evidence before the court was the verified petition of the appellees, and the sworn answer and the report and order of the Inter-State Commerce Commission. An opinion by Circuit Judge Henry G. Ward, presiding, concurred in by District Judge Julius N. Mayer, was filed (Rec. pp. 109–112) in which it was held (Rec. p. 110):

> Congress has unquestionably the power to declare what terms common carriers subject to the interstate commerce act of 1887 and its amendments may or may not insert in their bills of lading, and it has done so from time to time. For the purpose of this case we shall assume that Congress can delegate this legislative power to the Interstate Commerce Commission, but we shall expect to find such delegation in clear and unmistakable language. Examination of the statutes does not convince us that Congress had any intention to confer upon the commission the right to prescribe the terms of the carriers' bills of lading.

A dissenting opinion was filed by District Judge Learned Hand (Rec. pp. 113–118.) The motions to dismiss the petition were denied and the motion for a preliminary injunction was granted and an order duly entered. (Rec. pp. 119–120.) From this order an appeal was taken to this court by the United States and Interstate Commerce Commission, under the act of October 22, 1913 (38 Stat. 220; Comp. Stat. sec. 998).

SPECIFICATION OF ERROR.

The district court erred:

1. In holding and adjudging that the Interstate Commerce Commission was and is without power and authority after full hearing to enter the order in controversy, dated April 14, 1919, in the proceeding entitled *In the Matter of Bills of Lading*, No. 4844.

2. In finding and deciding that under section 15 of the act to regulate commerce the Commission has power only over "rates, classifications, regulations, or practices in connection with the receiving, handling, transporting, storing, and delivery of property," and not over bills of lading.

3. In finding and deciding that while the Commission has power, under section 12 of the act to regulate commerce, to investigate the fairness of the carriers' bills of lading, it is not authorized "to draw the carriers' bills of lading either in whole or in part."

4. In finding and deciding as follows: "We shall not inquire whether the alterations the Commission has prescribed in the bills of lading are reasonable or

not, because we think it has no power to prescribe an inland bill of lading * * * depriving the carriers of the benefits of the statutes limiting the liability of vessel owners and of the Harter Act."

5. In entering an interlocutory order or degree granting the preliminary injunction broader in terms and effect than the case alleged and the relief prayed in the petition.

6. In overruling the motions of the United States and of the Interstate Commerce Commission to dismiss the petition. (Rec. 122–124.)

THE ISSUE.

The fundamental question involved is: Has the Commission jurisdiction to determine, after hearing, that specified provisions, rules, and regulations contained in bills of lading in use by carriers subject to the act to regulate commerce, are unlawful, and, to prescribe what will be just and reasonable rules and regulations to be thereafter adopted and followed; and to order the carriers to cease and desist from such violations of the act and conform to and observe the rules and regulations so prescribed?

ARGUMENT.

I.

DID THE COMMISSION HAVE JURISDICTION TO MAKE THE ORDER?

The answer to this question requires a clear definition of the duties of the Commission, its place in the scheme of regulation and the substantive law governing carriers, contained in the act to regulate commerce.

1. *Statutory provisions.*—By section 12 of the act to regulate commerce it is provided that the Commission shall have authority to inquire into the management of the business of common carriers subject to the act—

> and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created, and the Commission is hereby authorized and required to execute and enforce the provisions of this act; * * *.

By section 15 of the act, it is provided—

> That whenever, after full hearing * * * under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion, * * * that any individual or joint classifications, regulations, or practices *whatsoever* of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial *or otherwise in violation of any of the provisions of this act*, the Commission is hereby authorized and empowered to determine and prescribe what * * * regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which

> the Commission finds the same to exist, * * *, and shall conform to and observe the regulation or practice so prescribed.

2. *Judicial construction.*—Defining the character of the Commission, this court, speaking through Mr. Justice McKenna, in *Int. Com. Comm.* v. *United States ex rel. Humboldt S. S. Co.* (224 U. S. 474, 484), said:

> The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act.

In *United States* v. *L. & N. R. R.* (235 U. S. 314, 320) the court, speaking through the Chief Justice, said:

> It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.

In *Int. Com. Comm.* v. *Chi. R. I. & P. R. Co.* (218 U. S. 88, 108) the court, again speaking through Mr. Justice McKenna, said:

> As we have said, the Commission is the tribunal that is entrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers * * *

In the *Minnesota Rate Cases* (230 U. S. 352) this court, speaking through Mr. Justice Hughes, said:

> The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; * * *

The duty imposed upon the Commission to administer and enforce the act to regulate commerce, carries with it powers of regulation, which are not specifically, or expressly stated in the act as, for instance, the tariff regulations in which perishable freight shall be precooled and preiced for shipment and the charges therefor (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199); to determine the reasonableness of demurrage rules (*Proctor & Gamble Co.* v. *United States*, 225 U. S. 282); to fix the divisions of through rates with tap lines to prevent rebating (*Tap Line Case*, 234 U. S. 1; *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457); to determine rights to switching privileges (*Penna. R. Co.* v. *United States*, 236 U. S. 351; *L. & N. R. R.* v. *United States*, 238 U. S. 1); to regulate the distribution of coal cars (*Int. Com. Comm.* v. *Ill. Cent. R. R. Co.* 215 U. S. 452); to construe tariffs and determine the duties and obligations of the carriers thereunder (*Texas & P. Ry. Co.* v. *American Tie Co.*, 234 U. S. 138; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43).

In all questions arising under the act regarding the duties required of common carriers by the act, the determination by the Commission is primary and exclusive. (*Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *B. & O. R. R.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Tex. & Pac. Ry.* v. *American Tie Co.*, 234 U. S. 138; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 304; *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S. 456; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43.)

In *Mitchell Coal Co.* v. *Penna. R. R.*, *supra*, the court, speaking through Mr. Justice Lamar, said (p. 255):

> The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally * * *.

In *Penna. R. R. Co.* v. *International Coal Co.* (230 U. S. 184, 196), Mr. Justice Lamar, speaking for the court, said:

> So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts.

In the *Minnesota Rate Cases*, speaking through Mr. Justice Hughes, the court said:

> as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the prelim-

> inary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it.

In *Texas & Pac. Ry. Co.* v. *American Tie Co., supra,* the rule was stated by the court, speaking through the Chief Justice (p. 146), as follows:

> It is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute.

In *Loomis* v. *Lehigh Valley R. R. Co.*, the court, speaking through Mr. Justice McReynolds, said (p. 50):

> In the last analysis the instant cause presents a problem which directly concerns ratemaking and is peculiarly administrative. (*Atchison, Topeka & Santa Fe Ry.* v. *United States*, 232 U. S. 199, 220.) And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. (See *Penna. R. R.* v. *Puritan Coal Co., supra,* pp. 128, 129; *Penna. R. R.* v. *Clark Coal Co., supra,* pp. 469, 470.)

From the foregoing authorities it is clear that the Commission has jurisdiction and power to determine what are unjust and unreasonable rates, charges, regulations, and practices, and to order the carrier to cease and desist from unlawful acts and to comply

with the reasonable rates, charges, regulations, and practices prescribed as reasonable by the Commission. There are certain provisions in the act conferring jurisdiction upon the courts to issue mandamus to compel the performance of services by the carrier; for example, compelling the movement of traffic and the furnishing of cars or other facilities for transportation. (Sec. 23.) But where the act forbids the charging of unjust and unreasonable rates, the making of unjust and uneasonable rules and regulations or unjust and unreasonable practices, it raises the administrative question, to be determined by the Commission, whether the rates, rules, regulations, or practices by the carriers are in fact unjust and unreasonable, and therefore unlawful. Not all discriminations are unjust or unreasonable. It is a question of fact in each case whether rates, regulations, or practices complained of are unjust and unreasonable, to be determined by the administrative tribunal created to enforce the act. (*Commission* v. *B. & O. R. R.*, 145 U. S. 263; *Tex. & P. Ry.* v. *Int. Com. Comm.*, 162 U. S. 197, 219; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624.) If the courts may not determine these administrative questions, as this court has clearly held, then the requirements of the act hereafter quoted as to bills of lading must be without any tribunal to enforce them if this Commission does not possess that power. But the Commission's power to enforce all the provisions of the act—except where power to do so is expresssly

vested in the courts—is so clearly stated in the act and in the decisions of this court, that it only remains to examine the act to determine whether, as now amended, it forbids the carrier from doing any things in reference to the issuance, form, and substance of bills of lading that are unjust and unreasnable, and declares unjust and unreasonable acts in reference thereto unlawful.

3. By an act to create a commerce court and to amend the act entitled "An act to regulate commerce," etc., approved June 18, 1910 (c. 309, 36 Stat. 539), it is, *inter alia*, provided:

> SEC. 7. That section 1 of the act entitled "An act to regulate commerce," approved February 4, 1887, as heretofore amended, is hereby now amended so as to read as follows: * * *.
>
> "And it is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the issuance, form, and substance of tickets, receipts, and bills of lading, * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and

practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful."

By an act commonly known as the Cummins amendment, approved August 9, 1916 (c. 301, 39 Stat. 441), it is provided:

> That any common carrier, * * *, receiving property for transportation * * * *shall issue a receipt or bill of lading therefor,* and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country *when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever,* shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation * * * *shall be liable to the lawful holder of said receipt or bill of lading* or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, *for the full actual loss, damage, or injury to such property* caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent

> foreign country when transported on a through bill of lading, *notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading,* or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; *and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void:* * * *. [Italics ours.]

These amendments requiring that all regulations and practices affecting the issuance, form, and substance of bills of lading shall be just and reasonable, and prohibiting any limitation of the carrier's liability for loss of, or damage to, property transported by provisions in the bill of lading, call for supervision and enforcement by the Commission under the provisions of section 12. The power to make investigations of such regulations and practices, in the form and substance of the bills of lading used by carriers, is clearly contained in the provisions of section 15. And the Commission is expressly authorized by section 15, if it finds any such regulations or practices in the issuance, or the form, or the substance of these bills unjust and unreasonable, to prescribe "what will be the just and reasonable regulation, practice, form, or substance" of bills of lading. The Commission does not initiate a bill of lading; it investigates the regulations and conditions in the bill of lading in use by carriers and determines whether any specific pro-

visions therein violate express provisions of the law, or are unjust and unreasonable, and bases its order upon its findings.

As before noted, when the Commission made its first report (14 I. C. C. 346) the requirements contained in the two amendments above quoted were not in the act.

By an act approved August 29, 1916, entitled "An act relating to bills of lading in interstate and foreign commerce" (c. 415, 39 Stat. 538) Congress provided for negotiable and nonnegotiable bills of lading, made certain requirements as to the duties and obligations of carriers, and the rights of shippers, consignees, and endorsees under such bills. This act constitutes a part of the law of Congress upon the subject. It does not, however, in any way lessen the force and effect of the amendments to the act to regulate commerce above quoted. The Commission, in passing upon the regulations and practices regarding the issuance, forms, and substance of bills of lading under the act to regulate commerce, will give consideration and force to this bills of lading act—that is to say, it will not permit the carriers by any regulation or practice in the issuance, or the form, or the substance of bills of lading to violate the requirements of this act. The power and jurisdiction of the Commission, however, is determined by the act to regulate commerce.

We respectfully submit that in view of the foregoing, there can be no question that the Commission had jurisdiction to issue the order in controversy.

II.

WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER?

The allegations of the petition are very general in character. There are no specific allegations of fact entitling the appellees to the relief prayed for. In Paragraph VII of the petition it is alleged—

> The Commission has, without supporting evidence, undertaken to require the elimination of current provisions in the bill of lading long in use by petitioners and others, and the modification of other provisions in that bill. The provisions which are directed to be stricken out are not in conflict with any rules of law.

It may be true that the provisions in the bill of lading which the Commission has eliminated or changed were lawful when adopted. But such contracts may become unlawful by a change in the law. (*Armour Packing Co.* v. *United States*, 209 U. S. 56.)

The questions involved are mainly questions of law arising on the face of the bills of lading in use or proposed by the carriers. A large amount of testimony was heard by the Commission and a full opportunity was given the appellees and others to introduce any evidence which they desired and which had any bearing, or would throw any light, upon the issues before the Commission. The petition does not offer to produce the record of evidence before the Commission, as is usually done in cases where any reliance is placed upon the allegation that there was not

substantial evidence to support the order. The sworn answer of the Commission denies each allegation in the petition that there was no evidence to support the findings and order and alleges affirmatively that there was evidence to support the same. The rule established by this court is that where a petitioner does not present the record before the Commission for examination by the court, the findings of fact by the Commission are accepted as correct and as supported by evidence (*L. & N. R. R. Co.* v. *United States*, 238 U. S. 1; *Int. Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452; *Ill. Cent. R. R.* v. *Chicago & Alton R. R.*, 215 U. S. 479). And when the record is presented to the court it will not pass upon the sufficiency of the evidence, but only determine whether there was any substantial evidence to support the order. (*Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482; *United States* v. *L. & N. R. R.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361.) Even where the facts are undisputed it is not a question of law as to whether the facts constitute unjust or unreasonable discrimination, but an administrative question to be determined by the Commission. (*United States* v. *L. & N. R. R. supra.*) The issues before the Commission in this case were clearly defined, the facts are reviewed, and the lawfulness of the provisions assailed are determined by the Commission in its report.

We submit, therefore, that upon these general allegations in the petition, denied by the sworn answer of the Commission, the appellees are not entitled to the relief prayed for, and the motions to dismiss the bill should have been allowed.

In presenting their case in the court below appellees did not insist upon all of their contentions before the Commission. We shall, therefore, discuss the questions raised by the appellees in the court below in the order in which they appear in the dissenting opinion of Judge Learned Hand.

III.

ELIMINATION OF THE EXEMPTION FOR LOSS AND INJURY DUE TO STRIKES AND RIOTS.

The provision in the bill presented proposed by the carriers, section 1, clause 4, provides:

> Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession) the carrier or party in possession shall not be liable for loss, damage, or delay occurring * * * from riots or strikes, * * *.

This provision was to apply to carrier liability while the goods were in transit. The Commission's finding and ruling upon this provision is found on page 705 of the Commission's report, and reads as follows:

> Although the matter is not brought in issue, we are not satisfied with the carrier's claim of exemption, which is included in this

> clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for "delay caused by riots or strikes," as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable.

The finding of the Commission is supported by many judicial opinions. The statement of the law upon losses caused by strikes and mobs is succinctly stated by the author in section 415, Volume X, Corpus Juris, and is supported by authorities there cited. We adopt the author's statement, which reads:

> *Strikes and mobs.*—The carrier is liable for the negligent or wrongful acts of its servants during the course of their employment, and therefore if its employees go on a strike, abandoning the performance of their duties and causing delay in the transportation of goods in their charge or control, the carrier is liable, the delay being due to the employees' wrongful acts. And after the employees have quit the carrier's employment it is its duty to promptly supply their places, if practicable. But where the strike which caused the delay is not that of the carrier's employees, and the carrier does all that it can to expedite delivery, it is not liable for the delay. So a carrier is not liable for delay due to a riot not engaged in by its employees, which riot renders the running of trains unsafe

> or impossible. And if, after leaving the carrier's employment, the employees, by violence, cause delay in the transportation, so as to prevent the carrier from proceeding with his business, the delay thereby occasioned will be excusable. If by mob violence the carrier is prevented from performing its obligations to transport goods in its charge or control, it will be excused for resulting delay. The only duty resting on the carrier not otherwise in fault is to use reasonable efforts and due diligence to overcome obstacles thus interposed and to forward the goods to their destination; but this duty is one which it is bound to observe.

The appellees referred to the Carmack and Cummins amendments wherein the phrase "caused by it" is used, and contended that that phrase limited their liability to losses actually caused by them—that is, directly attributable to the acts of the carrier. This construction is unwarranted.

This phrase "caused by" was considered by this court in *Galveston, H. & S. A. Ry. Co.* v. *Wallace* (223 U. S. 481, 491), where the carriers insisted that this phrase cast upon the shipper the burden of proving that a loss or damage was *caused by* the carrier, insisting "that the Carmack amendment did not make it an insurer." The court rejected this construction of the act. And again in *Chi. & E. I. R. R. Co.* v. *Collins Co.* (249 U. S. 186, 191), the carriers again made the claim that this phrase in the Carmack amendment "cast upon the shippers the burden of proving affirmatively that the loss which occurred on

a connecting line was 'caused by' the connecting carrier." This construction was again held untenable.

The Carmack amendment extended the liability of the initial carrier for any loss, damage, or injury caused "by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass," etc., and the Cummins amendment, now in force, prohibits any restriction of common-law liability by stipulation or agreement in the receipt or bill of lading except that as to property other than ordinary live stock the liability for loss may be restricted to a value placed upon the property by the shipper to secure a reduced and released rate, which rate has been approved by the Commission. It is clear that these amendments in no way change the existing common-law liability in any other particulars than those stated. At common law the initial carrier was not liable for damage or loss caused by a connecting carrier to whom the goods were delivered for further transportation. At common law and under the rulings of this court restrictions upon the carrier's liability, other than for the carrier's negligence, could be made by contract or agreement; this contract privilege is entirely cut off by the Cummins amendment except as to released rates approved by the Commission.

We submit, therefore, that the Commission committed no error in its ruling regarding strikes and riots.

IV.

LIMITING THE LIABILITY OF THE INITIAL CARRIER.

This provision is in direct conflict with the Carmack-Cummins amendment making the initial carrier liable for loss and damage beyond its own line. (*Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.) This liability extends not only to carrier liability while the goods are in transit but also to losses and damages for which the carriers are liable as warehousemen. (*Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.)

Clearly there was no error in eliminating this provision limiting the liability of the initial carrier to its own line.

V.

CARRIER LIABILITY DURING "FREE TIME."

Section 4, clause 1, of the bill of lading proposed by the carriers, contained this provision:

> Property not removed by the party entitled to receive it within 48 hours (exclusive of Sundays and legal holidays) after notice of its arrival has been duly sent or given, may be kept in vessel, car, depot, or place of delivery of the carrier or warehouse, subject to the tariff charge for storage and to carrier's responsibility as warehouseman only, * * *.

This provision was objected to by the shippers, and the counter proposal of the shippers was:

> The liability of the carrier as a common carrier shall terminate at such time as is provided or determined by law.

The Commission discuss the proposition in the report (pp. 712, 713). The principle involved is also discussed by the Commission in its report under section 1, clause 3 and clause 4, on pages 695 to 705, inclusive.

Before the Commission the carriers, including appellees, pressed their claim for a definite period to eliminate in all cases any question as to when the carrier liability ceased and the liability of the carrier as warehouseman began. The general rule has been recently stated by this court in *Erie R. R. Co.* v. *Shuart et al.* (250 U. S. 465, 468). The court, speaking through Mr. Justice McReynolds, said:

> In the instant case, when injured, the animals were awaiting removal from the car through a cattle chute alleged to be owned, operated, and controlled by the railroad. If its employees had then been doing the work of unloading there could be no doubt that transportation was still in progress; and we think that giving active charge of the removal to respondents, as agreed [in the bill of lading], was not enough to end the interstate movement. The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actual removal. (See Hutchinson on Carriers, secs. 711, 714, 715.)

The question as to what is a "reasonable time" for unloading depends upon the character of the traffic, the conditions of shipment, notice of arrival, and the general custom at the point of delivery in regard to the traffic.

What is a reasonable time in a given case is a question of fact and not a question of law. It may be determined in certain cases by a jury or it may be determined, as to interstate traffic by this Commission. When interstate commerce is affected it is a Federal question. (*Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.) It is not a matter that directly lessens the liability of the carrier as determined by the Carmack and Cummins amendments. It was, therefore, clearly within the jurisdiction of the Commission to permit a fixed time after due notice to the consignee at the expiration of which carrier liability should cease and liability as a warehouseman should begin. The only limitation upon the Commission being that it could not determine the question arbitrarily by fixing an unreasonably short time or determining the question without consideration of some substantial evidence as to what was a reasonable time. As already stated, what is a reasonable time is to be determined upon a consideration of the custom at point of delivery. Three general rules are stated by Hutchinson on Carriers, Volume II, third edition, sections 701 to 704, inclusive. Under what is known as the Massachusetts rule, the liability of the carrier as an insurer ends

when the goods have arrived at their destination and, even without notice to the consignee, have been safely deposited upon the platform or in the warehouse of the terminal carrier. Under the New Hampshire rule such liability ends when the goods have arrived at destination and a reasonable time during which they might have been removed has elapsed, no actual notice of arrival being required. By the New York rule, sometimes called the Michigan rule, if the consignee is present when the goods arrive, he must take them without unreasonable delay; if he is not present he must be notified, if in the immediate vicinity, of the arrival of the goods and then must have a reasonable time in which to remove them. The latter rule, requiring knowledge or notice of the arrival, seems to be the most reasonable. As to what time must be allowed after notice or knowledge of the arrival is a question of fact which may be determined as already stated by the Commission.

The question of a reasonable time for unloading arises in the case of demurrage. Before demurrage can be charged a "reasonable time" must be given for unloading. The reasonableness of regulations fixing the time and the amount of demurrage is an administrative question to be determined by the Commission. (*Procter & Gamble Co.* v. *United States*, 225 U. S. 282.) The times applicable to different classes of traffic fixed by demurrage rules were before the Commission and this, while not controlling, was sub-

stantial evidence which the Commission could consider in fixing a reasonable time for unloading where carrier liability is involved. It can not be said, therefore, that the decision of the Commission was without substantial evidence and its conclusion on that ground can not be assailed in court.

The reasoning of the Commission is found in its report at the pages above cited, and its conclusion upon this point was:

> The rule can not be approved in the form proposed by the carriers. In lieu thereof we are of the opinion that a rule phrased as follows would be just and reasonable:
>
> "Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse, or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only or, at the option of the carrier, may be stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

This rule gives a definite measurement to what is a "reasonable time" for unloading, namely, "the free time allowed by tariffs lawfully on file * * * after notice of the arrival of the property * * *." The notice to be given is further specified. In the view of the Commission, therefore, under all the facts considered, the "free time" in the tariffs governing demurrage constituted "a reasonable time for unloading" before carrier liability ceases and that of warehouseman begins.

As already stated this is a question of fact to be determined by the Commission. It had before it substantial evidence and as stated by this court the weight of that evidence will not be determined by the court, or, as stated by Mr. Justice Lamar in the *Union Pacific R. R. case, supra:*

> It will not consider the expediency, or wisdom of the order, or whether, on like testimony it would have made a similar ruling. (Id. p. 547.)

A rule determining what is a reasonable time is of public importance. Under the law as it now exists the chances of litigation growing out of the uncertainty of the time are considerable and a definite rule fixing the time in each case will tend to settle controversies.

We submit, therefore, that as to this point the motions to dismiss should have been granted.

The next question raised, as to delivery on private sidings, and the following, as to the liability of the consignor for freight delivered without requiring

payment, are administrative questions which fall clearly within the jurisdiction of the Commission.

VI.

BURDEN OF PROOF.

Casting the burden of proof upon the carriers on all issues of negligence does not change or affect their liability. The Commission followed the rule of evidence announced by this court in *Galveston, H. & S. A. R. Co.* v. *Wallace* (223 U. S., 481, 491, 492), where this court, speaking through Mr. Justice Lamar, said:

> Under the Carmack amendment, as already construed in the Riverside Mills case, wherever the carrier voluntarily accepts goods for shipment to a point on another line, in another State, it is conclusively treated as having made a through contract. * * * This case, then, must be treated as though the point of destination was on its own line, and is to be governed by the same rules of pleading, practice, and presumption as would have applied if the shipment had been between stations in different States, but both on the company's railroad. Thus considered, when the holders of the bills of lading proved the goods had not been delivered to the consignee, the presumption arose that they had been lost by reason of the negligence of the carrier or its agents. The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. The plaintiffs were not obliged both

> to prove their case and to disprove the existence of a defense.

The foregoing case is also cited and followed in *Chicago & E. I. R. R. Co.* v. *Collins Co.* (249 U. S., 186, 191).

The principle here announced disposes of the objection of the appellees to this ruling of the Commission.

VII.

VALUE AT POINT OF ORIGIN.

The domestic bill in use and proposed by the carriers provides, section 2, clause 3, that in case of loss or injury—

> the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the actual value of the property at place and time of shipment under this bill of lading, including the freight charges, if paid; * * *

This provision was in the uniform bill of lading approved by the Commission in its decision in 1908. It is now rejected because of the provisions of the Cummins' amendment. The sole question arises as to the effect of the Cummins' amendment already quoted. That amendment declares that the carrier—

> shall be liable to the lawful holder thereof for any loss, damage, or injury to such property * * * and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, * * * from the liability hereby imposed.

As already noted, there is a provision validating restricted rates which have been approved by the Commission, but this proviso has no bearing upon the question now being discussed.

There can be no question, and the court may take judicial notice of the fact, that the value of the property at point of origin, generally speaking, is less than its value at the point of destination. The point of origin is the producing territory while the point of destination is usually the primary and other markets for the goods. The common law rule was and is that in case of such loss the damages are to be measured by the value of the property at the point of destination.

> The general rule is that, when goods delivered to a carrier for shipment are lost in transit, the carrier will be liable for the market value of the goods at the place of destination at the time when delivery of the goods should have been made, less the freight charges to the point of destination if they have not already been paid.
>
> *In case of injury.*—Similarly, where goods intrusted to a carrier for shipment are injured through causes for which the carrier is responsible, the owner of the goods is entitled to recover the difference between the value of the goods at the time and place of delivery in an uninjured condition and their value in the depreciated condition in which they were delivered, less the freight charges to the point of destination if they have not already been paid. (Sec. 606, vol. 10, Corpus Juris, *New*

York, etc., R. Co. v. *Estill,* 147 U. S. 591; *Mobile, etc., R. Co.* v. *Jurey,* 111 U. S. 184; *Canadian Pac. R. Co.* v. *Wieland,* 226 Fed. 670.)

If the common-law rule is not followed, but the value at point of origin is taken as the measure, the damages for the loss of the property are materially lessened. For illustration (and this is an actual case), five cars of wheat were purchased in Kansas City and shipped to Chicago; relying upon the delivery of the grain in Chicago, the consignor, who was the purchaser in Kansas City, sold the grain for delivery in Chicago during the current month. Four cars duly arrived, but one went astray and was not located for some time after the current month. The result was that the purchaser had to buy in the Chicago market a car of grain to enable him to perform his contract. The price of grain having advanced he was subjected to considerable damage by reason of the failure of the carrier to deliver the car. If the carrier's liability in that case was determined by the value of the car of grain in Kansas City, at the time of its receipt by the carrier, it is apparent that the full damages sustained by the shipper could not be recovered and he would be the loser of a considerable sum by reason of the failure of the carrier to perform its carrier obligations. The validity of this clause in the bill of lading, under the Cummins amendment, came before the District Court for the District of Minnesota, fourth division, and Morris, district judge, referring

to the stipulation in the Cummins amendment "shall be liable * * * for the full actual loss * * * caused by it * * * notwithstanding any limitation * * * in any * * * bill of lading," held:

> I do not see how it is possible to escape the conclusion, upon a fair and open minded consideration of the language of the amendment and the obvious and the well-known meaning of its terms, that this provision or stipulation in the bill of lading is a limitation of the liability of the carrier and of the amount of recovery and is, therefore, unlawful and void.

The Commission, in view of the provisions of the Cummins amendment, struck out of the domestic bill this provision making the value of property at point of origin, less freight charges not paid, the measure of damages, and relegated the carriers to their common-law liability whatever that may be in particular instances.

This provision is, however, retained in the export bill for the reason that the Commission thought the Cummins amendment did not apply to foreign commerce.

VIII.

THE ELIMINATION OF CLAUSES PROTECTING WATER LINES.

The Commission makes no claim to jurisdiction over the ocean carriers of commerce to or from nonadjacent foreign countries. It does claim jurisdiction over the inland carriers engaged in moving foreign commerce to or from the ports. Section 1

of the act to regulate commerce, describing the transportation subject to the act, reads *inter alia*—

> from any place in the United States to an adjacent foreign country, * * * also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

From this it seems clear that the act and the jurisdiction of the Commission extend to the transportation of foreign commerce from interior points in the United States to the ports of transshipment to ocean vessels and from the ports of entry in the United States or an adjacent foreign country to points within the United States. Where the carriers subject to the act to regulate commerce, and to the jurisdiction of the Commission, engage in foreign commerce and issue through bills of lading to foreign ports the bills of lading which are issued by them are subject to regulation by the Commission. And carriers subject to the act may not issue any export bills or receipts for property under unjust and unreasonable regulations, either as to their issuance, form, or substance. These carriers could be restricted to issuing bills of lading from the points of origin to the ports and leave the shippers to make arrangements with, and take bills of lading from, the ocean carriers at the port, but to facilitate foreign

commerce carriers subject to the act are permitted to issue export bills of lading, thus carrying the traffic through the port to the ship. In granting this privilege in the interest of commerce, Congress has not surrendered its full jurisdiction over the carriers engaging in it and the provisions of the act forbidding unjust and unreasonable rules, regulations, and practices, in the particulars named in the act, apply to export and import traffic.

Congress has exercised its powers of regulation over foreign commerce by water in what is known as the Harter Act (c. 105, 27 Stat. 445). The provisions of this act do not apply to inland rail carriers but are applicable to ocean carriers, although the traffic is carried on under export bills of lading. In the export bill the Commission has considered and enforced the duties of rail carriers, under the act to regulate commerce, as primary duties in conducting the inland part of the transportation, carefully guarding these provisions so as not to interfere with the provisions of the Harter Act which apply to the ocean carriers.

The Carmack amendment applied by its terms to transportation of property from "a point in one State to a point in another State." This did not include foreign commerce.

The Cummins amendment specifies the commerce to which that amendment applies and includes transportation "from any point in the United States to a point in an adjacent foreign country," but does not include transportation to a nonadjacent foreign

country. The limitations in these amendments upon the right to restrict liability and to fix a measure of damages in case of loss or injury to property transported does not apply to foreign commerce with a nonadjacent foreign country. For this reason the Commission has permitted certain provisions to remain in the export bill limiting the carrier's liability where like provisions are excluded from the domestic bill. The discussion of this question by the Commission is found in its report (pp. 726–740).

Until we are advised by the appellees' brief of the particular rulings by the Commission regarding provisions in the export bill to which they object, we shall content ourselves by referring the court to the reasoning and conclusions of the Commission in its report, reserving for a reply brief a discussion of provisions in the export bill which are specifically complained of by the appellees.

CONCLUSION.

For the reasons herein stated we submit that the court below erred in refusing to grant the motions of appellants to dismiss the petition, and in granting the motion for an injunction.

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NOVEMBER, 1919.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 541.

United States of America and Interstate Commerce Commission, Appellants,

vs.

Alaska Steamship Company et al., *Appellees.*

BRIEF FOR CARRIERS UPON THE EFFECT OF THE TRANSPORTATION ACT OF 1920.

On March 22, 1920, the Court entered this order:

> "Counsel are requested to file briefs concerning the effect upon the issues herein involved resulting from the Act of Congress terminating the Federal control of railroads,

and amending the Act to Regulate commerce in certain particulars, approved February 28, 1920."

We comply with this request by noting herein the bearing of the Amendment of February 28, 1920 (Transportation Act) on the several points made, and in the order made, in our original brief.

FIRST POINT.

No authority is given the Commission by the Transportation Act to draw the carriers' bills of lading.

Section 1 of the Act to Regulate Commerce (page 5 original brief) requires railroads "to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the issuance, form, and substance of * * * bills of lading." The Transportation Act of 1920, (Sec. 400, subd. 6) re-enacts this duty without change of language.

Section 15 of the Act to Regulate Commerce (page 5 original brief) on which the Commission relied for power has been re-enacted in Sec. 418 of the Transportation Act without change, except that the Commission is granted power to fix "the maximum or minimum" rates.

Section 12 (page 14 original brief) was not amended by the Transportation Act.

Commissioner Clark at the hearings before the House Committee having in charge the bill which became the Transportation Act brought this case to the attention of the Committee and described the decision of the District Court as holding "that while Congress had undoubted right to prescribe the terms and conditions of the bill of lading, it has not conferred upon the Commission the power to prescribe them." See Hearings, 66th Cong. 1st Session on H. R. 4378, July 15-22, 1919, p. 138.

Although Congress re-enacted Sections 1 and 15 as above pointed out, it did not broaden the Commission's authority. The law was re-enacted so far as the subject-matter of bills of lading is concerned without change, leaving the right and power to make the bill of lading contract solely with the carrier and shipper. The Commission is left with the same power of review in case of unjust discriminations, undue preferences, etc., as it had before.

This re-enactment of existing law, substantially without change, is of the utmost significance in view of the decision of the District Court having been brought to the attention of Congress, which, by not changing the law, must be understood to have intended that the new law (as well as the old) should be understood as construed by the District Court, namely, that the Commission has no power to prescribe the bill of lading. That is to say, the

construction of the law expressed by the District Court is now impressed on the statute. This conclusion fairly results from various authorities. In *Lewis's Sutherland on Statutory Construction,* 2d Ed., Vol. 2, Sec. 403 (page 780), it is said:

> "*Re-enacted Statutes and Parts of Statutes.* In the interpretation of re-enacted statutes the court will follow the construction which they received when previously in force. The legislature will be presumed to know the effect which such statutes originally had, and by re-enactment to intend that they should again have the same effect. The same rule applies to the readoption of a constitutional provision. It is not necessary that a statute should be re-enacted in identical words in order that the rule may apply. It is sufficient if it is re-enacted in substantially the same words. The same principle applies when a statutory provision is taken from a constitutional provision which has been construed. The rule has been held to apply to the re-enactment of a statute which has received a practical construction on the part of those who are called upon to execute it."

In *Sessions* vs. *Romadka,* 145 U. S. 29, 42, Mr. Justice Brown said:

> "Congress, having in the Revised Statutes adopted the language used in the Act of 1837, must be considered to have adopted also the construction given by this Court to this sentence, and made it a part of the enactment."

In *Logan* vs. *United States,* 144 U. S. 262, 302, (syllabus) it was said:

> "It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do is clearly expressed."

These conclusions are reinforced by that part of Section 441, subdivision 4, of the Transportation Act which provides "The Commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading." If the Commission already had the power (as argued on its behalf) to prescribe bills of lading this grant would have been wholly unnecessary. It is to be observed that the power is only with respect to form and does not touch substance of bill of lading. Vesting in the Commission power to prescribe rules and regulations for this class of forms of export bill of lading for traffic in American vessels by the familiar maxim excludes the power claimed by the Commission.

SECOND POINT.

Section 437 of the Transportation Act of 1920 shows (*a*) that the Commission's order in striking out the water clauses was illegal under the Interstate Commerce Act and (*b*) would continue to be illegal under the Transportation Act of 1920.

Section 437 amends the Carmack-Cummins Amendment of Section 20 of the Act to Regulate Commerce by inserting immediately before the first proviso the following language:

> "*Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water."

Looking to the explanation of Congressional purpose in Committee Reports (Binns *vs.* U. S., 194 U. S. 486, 495) we find in Report 456, H. R. 66th Cong. 1st Session (by Mr. Esch) to accompany H. R. 10453, page 31, that the purpose of Section 437 (carried as Section 435 in the bill H. R. 4378) was thus explained:

> "*Liability of water carriers.* Section 435 amends the so-called Cummins' amendment to section 20 of the commerce act so as to make it clear that where loss, damage, or injury occurs where the property is in the

> custody of the carrier by water the liability is to be determined by the law applicable to transportation by water, which confines liability to the value of the vessel and the freight money."

So the intention of Congress is shown to have been "to make it clear" that the Harter Act and other legislation as to water line liability were not (for the past) repealed by implication in enacting the Cummins Amendments, and (for the future) that water carriage statutes governed the liability, and not to change the law. The dissenting opinion of Judge Hand in the District Court was to the effect that the water carriage statutes had been repealed, and it was apparently the desire of Congress to make it clear that this was not so.

Section 437 of the Transportation Act is controlling law that the liability of the water carrier engaged in joint service with a rail carrier is to be determined by the laws and regulations applicable generally to transportation by water; and that the liability of the initial rail "carrier shall be the same as that of such carrier by water." This declaration of Congress makes it quite clear that the Commission's order requiring the carriers to assume liability from which they were excused by the Harter Act and similar legislation was without authority of law.

But if the amendment should be read as intending to change the law on this point—that is, if the amendment proceeded upon the assumption that the Cummins amendments repealed the water statutes, then the case has now become moot in this respect, since the Commission now, by virtue of section 437 of the Transportation Act, is without power to require carriers to waive the benefit of the water carriage statutes, as its order under review purports to do.

It is significant also that the Transportation Act in Section 418, re-enacting Section 15 of the Act to Regulate Commerce, repeated in subdivision 3 the command of the old section 15 that "any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water." Re-enacting this clause shows the intent of Congress not to discriminate against water carriers which make joint rates with rail carriers.

Further proof that Congress did not intend the repeal of the water exemptions but on the contrary by express words preserved them is given by Section 441, subdivision 4, quoted *supra*, directing that "the protection of limited liability provided by law" shall be preserved in the through export bill of lading.

THIRD POINT.

This point was that "the Carmack-Cummins Amendments do not preclude a provision by which the value at place and time of shipment measures a loss."

The Transportation Act has no provision affecting this question.

FOURTH AND FIFTH POINTS.

These points are unaffected by any provision of the Transportation Act.

———o———

The argument in the carriers' original brief that Congress did not intend to entrust to the Commission regulation of the substance of bills of lading is emphasized by the Transportation Act of 1920. As in the Pomerene Act and in Section 20 of the Act to Regulate Commerce, Congress has made specific regulations, so in Section 438 of the Transportation Act Congress has made another specific regulation—of periods for notice for filing of claims and institution of suits—otherwise leaving to the carrier intact initiative under Section 1 of the Act to Regulate Commerce. Congress indicates that the matter is not for the administrative offices of the Commission.

The bill of lading prescribed by the Commission Appendix B, Trans. page 82) carries in Sec. 2 a provision that claims must be made in writing "within six months" in the case of do-

mestic traffic, and "within nine months" in the case of export traffic; and that suits "shall be instituted only within two years and one day after delivery of the property or after a reasonable time for delivery has elapsed."

Section 438 of the Transportation Act amends the Carmack-Cummins Amendments to Section 20 of the Interstate Commerce Act so that from the date of approval of the Transportation Act it is "unlawful * * * to provide by * * * contract * * * a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice."

The provision as to two years' limitation of suits carried in the Commission's bill would thus be invalid because in conflict with this provision of the Transportation Act of 1920.

Respectfully submitted,

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MARCH 27th, 1920.

No. 541.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS.

v.

ALASKA STEAMSHIP COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CLYDE STEAMSHIP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS IN RESPONSE TO THE ORDER OF THE COURT ENTERED MARCH 22, 1920.

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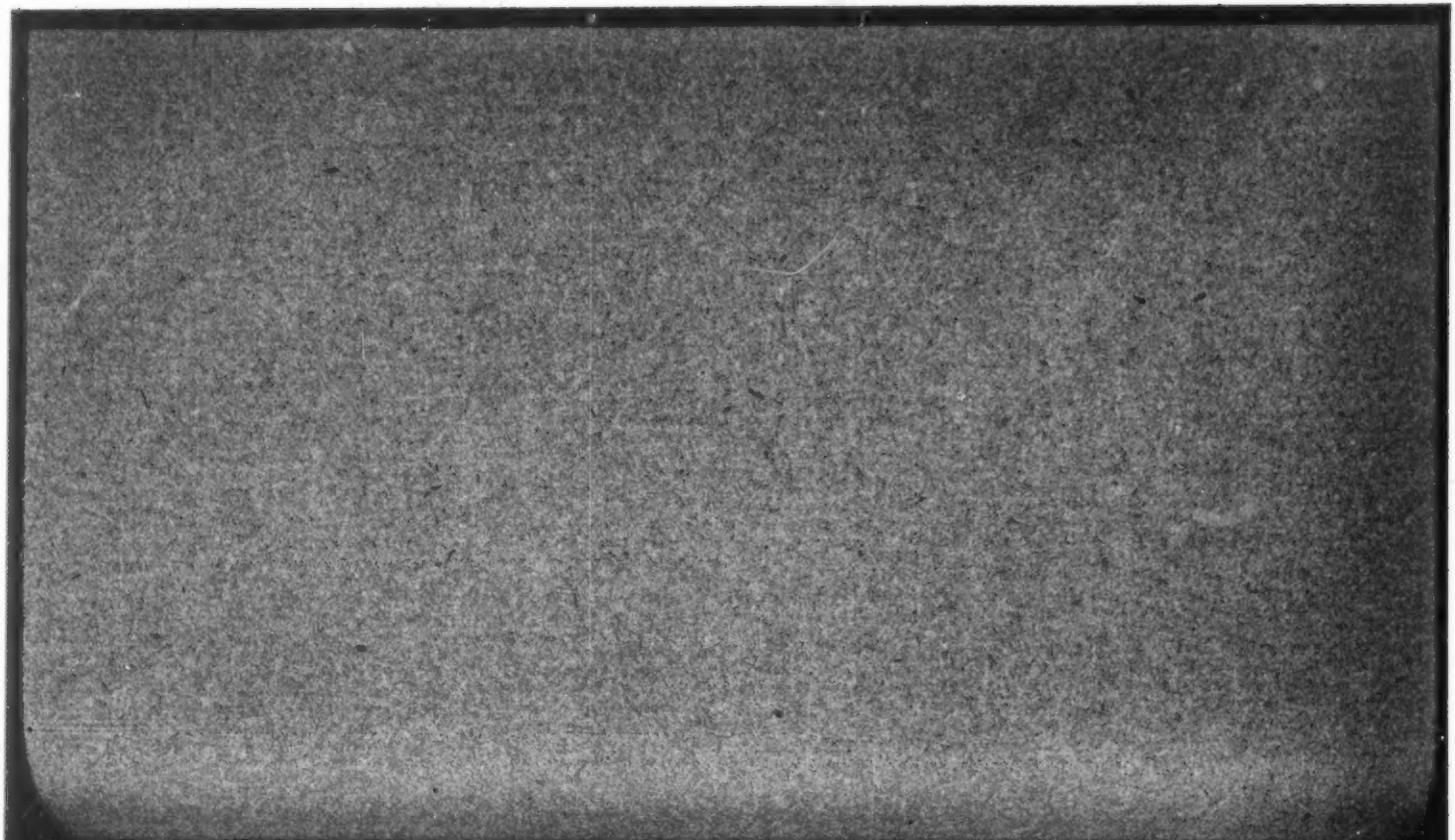

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THE UNITED STATES OF AMERICA AND Interstate Commerce Commission, appellants,

v.

ALASKA STEAMSHIP COMPANY, CENTRAL OF Georgia Railway Company, Clyde Steamship Company, et al.

No. 541.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS.

The appellants respectfully submit this brief in response to the following order of the court, entered March 22, 1920:

> Counsel are requested to file briefs concerning the effect upon the issues herein involved resulting from the act of Congress terminating the Federal control of railroads, and amending the act to regulate commerce in certain particulars, approved February 28, 1920.

Those issues are:

First. Has the Interstate Commerce Commission, under section 15 of the interstate commerce act as existing, which confers on it the power to determine and prescribe whether any regulation or practice whatsoever of a carrier is or will be unjust, or unreasonable, or unduly preferential, or prejudicial, or otherwise in violation of the act and also confers the power to determine and prescribe what regulation or practice is or will be just, fair, and reasonable—authority to review the regulations and practices of carriers affecting the issuance, form, or substance of bills of lading, and to pass upon differences between shipper and carrier as to certain provisions in said bills, claimed to be unjust, unreasonable, or otherwise illegal, and to prescribe the form to be used on these subjects, so as to render the substance of said bills in said particular just, fair, and reasonable?

Second. Does such power extend to export bills, covering water carriage, and are the provisions made in conflict with the Harter Act?

Third. Are the provisions of such bills, covering interstate shipments partly by rail and water carriage, in violation, as to the water carriers, of the Harter Act?

Fourth. Are any of the specific changes ordered to be made in said bills, illegal, or beyond the power of the commission if the general power to prescribe changes is sustained?

In this case it is respectfully submitted that the act of Congress, approved February 28, 1920, termi-

nating the Federal control of railroads and amending the act to regulate commerce in certain particulars (hereinafter called "new act") affects the issues in this case only as follows:

In the matter of export bills:

1. The act divides the carriage of foreign commerce by water carriage into two classes; one by carriage in vessels registered under the laws of the United States; the other in foreign vessels not so registered.

(*a*) As to the first class, the act expressly confers upon the Commission the power to formulate the bill of lading; it also terminates the rail carrier's liability after delivery to the vessel, and provides that the issuance of a through bill shall not be held to constitute an arrangement for continuous carriage or shipment.

(*b*) The new act says nothing as to the bills of lading in foreign commerce by rail in connection with foreign vessels not registered in the United States.

If there had been no preceding laws on this subject it would carry an implication that this movement in foreign bottoms was excluded. As, however, the existing statutes vested jurisdiction in the Commission which covered this second class of movement, the effect of the new act is to leave this class unaffected, and to be governed by the statutes previously enacted, and to regard the new act as a variance for the benefit of registered vessels to promote an American merchant marine. Any other ruling would be to the benefit of foreign ships.

(*c*) While, therefore, the act will require a new bill of lading to govern class 1, it does not affect the question raised by this case as to class 2, except to emphasize the fact that Congress could not have intended to relieve rail carriers using foreign bottoms from the regulation of the Commission as to the bills of lading they could issue and their liability thereunder.

This power is dependent on the construction this court will give to the sections of the act to regulate commerce as existing when the new act was approved, since these provisions are repeated without change in the new act.

As to domestic bills:

The only provision of the act affecting the issues is:

(*a*) The provision that the liability of the initial carrier and carrier by water where the carriage is partly or wholly by water, for loss to property, in custody of the carrier by water, is regulated by the laws and regulations governing water transportation requires the domestic bill to so provide.

(*b*) The remaining questions are not affected.

The necessity of deciding whether the Commission has the power set forth in question first above is the same, as the new act repeats the language of the then existing statute as to such power.

The controversy between carriers and shippers wherein the shippers contend that certain clauses of the uniform bill of lading adopted by the carriers under the direction of the commerce act, requiring them to adopt reasonable regulations

and practices as to the form and substance of bills of lading, are unjust, unreasonable, or illegal, and the opposing contention of the carriers, denying such charges and also contending that the Commission has no jurisdiction, if so deciding, to prescribe what are just, reasonable, and legal provisions and direct such provisions to be maintained, is unaffected by the new act and presses for decision.

Except as to the liability for loss while property is in the hands of a carrier by water the other questions remain the same.

They are conceded to be unaffected by the new act. (See Appellee's brief on effect, of Oct. 7, 1920, p. 9.)

As the question of power to prescribe the export bill used in connection with foreign vessels not having American registry remains, as well as of power over domestic bills, it is submitted that the Court should decide the case on the general power of the Commission presented in this cause, affirming, that as to export bills covering shipments on American registered vessels the statute now confers full power to regulate these, and reversing the case as to them. If the Court should not sustain the power to prescribe as to other bills in the particulars in issue before the Commission, as contended for by the Commission, the judgment should be affirmed, but with a saving of the power of the Commission to regulate said bills of lading on export shipments in American bottoms. If the power is sustained, then the judgment should be reversed.

A fuller discussion of these questions follows:

in, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to the consignor, consignee, or other person interested in the shipment after its delivery to the vessel. The Commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier.

The fifth paragraph provides that:

(5) The issuance of a through bill of lading covering shipments provided for herein shall not be held to constitute "an arrangement for continuous carriage or shipment" within the meaning of this act.

It will be observed that the provisions of this section is a plan which will aid, as well as regulate, water carriers of foreign commerce "whose vessels are registered under the laws of the United States." Foreign vessels, *not so registered*, are not included in or regulated by section 25.

The provisions of this section contain two distinct regulations of export bills of lading to be issued thereunder: (1) It is required that such bill of lading shall "name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge;" and (2) it provides that the Commission shall make "such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading." Certain duties are then imposed upon the carrier by rail and certain limitations upon such carrier's liability are stated.

Putting aside for the present the question of the right of rail carriers to initiate bills of lading to foreign ports for traffic to be carried by ships not registered under the laws of the United States, it is evident that the export bill, authorized by the order of the Commission in the case before this court, must now be changed to meet the specific requirements of the new law. The requirement that the rates and charges of each carrier—rail and water—shall be stated separately, including port charges not included in their line rate, is possible when taken in connection with the filing of schedules, and answers to inquiries, called for in other paragraphs of the section. It is a complete plan, affecting water carriers of a particular class, and the formulation of the bill of lading by the Commission is a part or incident of the plan. It is clear that the act confers jurisdiction upon the

Commission to *prescribe* the form of such a bill of lading; it is not to be initiated by the carriers. The carriers may, and probably will, be heard by the Commission regarding the form of this export bill, as has heretofore been done in prescribing forms of reports, accounting, bookkeeping, etc., which the Commission is required to initiate. But the power of initiation of the form of this particular bill of lading is, as we understand it, wholly with the Commission under the present law.

That power may be delegated to the Commission to prescribe forms to be used by carriers subject to the act, in transacting carrier business, has been fully sustained by this court. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Kansas City Southern R. Co.* v. *United States*, 231 U. S. 423.

This enactment by Congress settles the question of the jurisdiction of the Commission over the form of the bill of lading to be issued by rail carriers transporting foreign commerce, in connection with vessels registered under the laws of the United States.

II.

EXPORT BILL OF LADING TO BE USED BY RAIL CARRIERS AND VESSELS OF FOREIGN REGISTER.

It follows that the form of an export bill of lading to be used by rail carriers, where the traffic moves from a port of the United States to a foreign port, now before the court in this case, will have to be

changed by limiting it to vessels not registered under the laws of the United States. Some other changes in the form will be necessary, in view of other provisions of the new law hereinafter noted. This bill of lading, like the domestic bill, hereinafter discussed, is initiated by the carrier, the same as rates, charges, regulations and practices are initiated by the carrier. The jurisdiction of the Commission to hear complaints regarding specific provisions in the bill, thus initiated, and to determine whether such provisions are unreasonable or unlawful, is still before the court for decision on this appeal. The fact that changes will have to be made in the export bill, by reason of the new legislation, does not make the fundamental issue a moot question. As to this class of export bills of lading the jurisdiction of the Commission rests upon the general provisions of the interstate commerce act and will be discussed after reference to changes in the domestic bill of lading.

III.

DOMESTIC BILL OF LADING.

Section 438 of the act terminating Federal control amends section 20 of the interstate commerce act as follows:

> *Provided further*, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months,

> and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice.

Sec. 437 further amends section 20 of the interstate commerce act by inserting the following proviso:

> *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water.

These amendments will necessitate some changes in the domestic bill prescribed by the order of the Commission now pending in this case. But these amendments to the act do not change or affect in any manner the question of the jurisdiction of the Commission. Domestic bills, like rates, regulations, and practices, are still to be initiated by the carrier, the jurisdiction of the Commission over the subject matter, and the form of the bill, being the same as the power to hear complaints and determine whether the rates, regulations, and practices are reasonable.

IV.

JURISDICTION OF THE COMMISSION.

The Congress was advised of the pendency of this suit by Mr. Commissioner Clark at the hearing of the bill terminating Federal control. (Mr. Commissioner Clark, Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, July 15–22, 1919, pt. 1, p. 138.) The powers exercised by the Commission under the general provisions of section 15 of the act to hear and determine complaints regarding specific clauses and provisions in the bill of lading in use and proposed by the carriers was thus made known to the Congress. With this knowledge the committee recommended and the Congress reenacted, with slight amendments (not affecting the question here involved), the provisions in section 1 of the interstate commerce act. In so far as it affects bills of lading the amended paragraph of section 1 reads as follows:

> (6) It is hereby made the duty of all common carriers subject to the provisions of this act to establish, observe, and enforce just and reasonable * * * regulations and practices affecting * * * the issuance, form, and substance of tickets, receipts, and bills of lading, * * *.

Section 15 was also amended and reenacted. The powers exercised by the Commission in this case were reenacted and read as follows:

> (1) That whenever, after full hearing, upon complaint made as provided in section 13 of

> this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any regulation or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what * * * regulation or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * * and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 12 of the interstate commerce act requiring the Commission "to execute and enforce the provisions of the act" was not changed except to number the paragraphs.

The Commission having construed the act as giving to it full power to review provisions in bills of lading in use by carriers subject to the act and to eliminate unjust, unreasonable, and unlawful clauses, and the knowledge of this administrative ruling having been brought to the attention of Congress, the reenact-

ment of the law carries with it the construction thus given it by the Commission.

> We are not without the aid of a construction placed on acts similar to this by the other departments of the Government. We are aware that such construction is not conclusive but when the legislature, in framing an act, resorts to language similar in its import to the language of other acts, which have received a practical construction by the executive departments and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given the earlier. *State* v. *Moore*, 15 Nebr. 88; 69 N. W. 373, 378.

While the decision of the District Court in this case, by a majority of the judges, was brought to the attention of the Committee as stated in appellees' brief, the denial of its correctness and the proceedings to review the same were also stated. The Committee had actual notice of the administrative ruling by the Commission. Had the committee or Congress intended to limit the construction of the power claimed by the Commission they would doubtless have done so in express terms. Their repetition of the language, which the Commission had construed as conferring jurisdiction upon it, infers their agreement with the Commission that it was all-sufficient. As to the effect of departmental construction where a statute has been reenacted see *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401–2; *United States* v.

Falk, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos Y Compania*, 209 U. S. 337, 339; *Copper Queen Consol. Min. Co.* v. *Arizona*, 206 U. S. 474, 479.

We do not claim that under the law as it then stood and now stands the Commission has power to *initiate* bills of lading, excepting the through export bill to be used by rail carriers in connection with vessels registered under the laws of the United States. Our position is that the Congress, having again declared that all regulations regarding the issuance, form, and substance of bills of lading shall be just and reasonable, and that all unjust and unreasonable regulations regarding the same shall be unlawful, and having charged the Commission with the duty of enforcing all the provisions of the act, and expressly providing that if any such regulations or practices are found to be unjust or unreasonable, the Commission shall prescribe what will be just and reasonable regulations and practices to be thereafter followed, the jurisdiction of the Commission to hear and determine complaints regarding regulations in the form, substance, and in the issuance of bills of lading initiated by the carriers, is clear beyond question. With such jurisdiction the Commission had the power, and were expressly required by the act, if they found any regulations in the bills of lading under consideration in this proceeding unjust or unreasonable, to order such provisions eliminated and to prescribe just and reasonable regulations,

regarding the subjects covered, to be thereafter adopted and followed by the carriers.

It will also be observed that the interstate commerce act as amended confers broad powers upon the Commission as to all matters affecting the receipt, handling, transporting and delivery of traffic, and the charges therefor which the law requires to be just and reasonable. These powers are covered by the general jurisdictional clauses of the act set forth in sections 12, 13, 14, and 15.

Where the private side of the carriers' business is affected, or where there is some special scheme or plan prescribed by the law—as in the new section 25—express authority has been conferred upon the Commission. But the general jurisdiction and powers of the Commission cover all proceedings and orders pertaining to the enforcement of just and reasonable action by the carrier in the performance of his public duties. There is nothing in the act which defines what shall be held to be due or undue, unjust or unreasonable. "Such questions are questions, not of law, but of fact." *Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197, 219. "So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts." *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196. "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation

by the body created for that purpose." *Minnesota Rate Cases*, 230 U. S. 352.

The duty imposed upon the Commission to administer and enforce the act to regulate commerce, carries with it powers of regulation, which are not specifically or expressly stated in the act as, for instance, the tariff regulations in which perishable freight shall be precooled and preiced for shipment and the charges therefor (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199); to determine the reasonableness of demurrage rules (*Proctor & Gamble Co.* v. *United States*, 225 U. S. 282); to fix the divisions of through rates with tap lines to prevent rebating (*Tap Line Case*, 234 U. S. 1; *O'Keefe, Receiver*, v. *United States*, 240 U. S. 294; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457); to determine rights to switching privileges (*Penna. R. Co.* v. *United States*, 236 U. S. 351; *L. & N. R. R.* v. *United States*, 238 U. S. 1); to regulate the distribution of coal cars (*Int. Com. Comm.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452); to construe tariffs and determine the duties and obligations of the carriers thereunder (*Texas & P. Ry. Co.* v. *American Tire Co.*, 234 U. S. 138; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43).

In all questions arising under the act regarding the duties required of common carriers by the act the determination by the Commission is primary and exclusive. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *B. & O. R. R.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna.*

R. R., 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Tex. & Pac. Ry.* v. *American Tie Co.*, 234 U. S. 138; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Penna. R. R.* v. *Clark Coal Co.*, 238 U. S. 456; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43.

The regulations affecting the issuance, form, and substance of domestic bills of lading and export bills covering transportation by water by foreign carriers not registered under the laws of the United States are required by the act to be just and reasonable and if they are in any particulars unjust or unreasonable they are unlawful. This presents questions of fact which are cognizable under the general jurisdiction of the Commission. These administrative questions are to be settled by the administrative tribunal charged by law with the enforcement of the act. *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 50; *Texas & P. Ry. Co.* v. *American Tie Co.*, 234 U. S. 138.

The enormous quantities of bills of lading required daily in this country make the present situation embarrassing to shippers and carriers. The supplies of the old bills have run out and, while the question as to the forms of the new bills remains uncertain, the carriers and shippers do not want to incur the expense of printing large quantities of the old forms. It is very important and vital that this question, regarding the jurisdiction of the Commission, should be settled by this court. We therefore submit that

while the present forms covered by the orders in controversy in this suit will have to be changed in some particulars to meet the requirements of the new law, the jurisdictional question, upon which the case was decided in the court below, should now be determined by this court. This is not a moot question. The decision below denied the general power of the Commission. If the case is sent back without a determination of the jurisdiction of the Commission over bills of lading, it will have to be again determined by the Commission and brought again to this court, after months of delay for final action. This will, we submit, continue and increase the embarrassment and confusion already existing among carriers and shippers regarding this subject.

We respectfully ask that the decision of the court below holding that Congress did not "confer upon the Commission the right to prescribe the terms of the carriers' bills of lading" be reversed.

Respectfully submitted.

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For the Interstate Commerce Commission:

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APRIL, 1920.

○

No. 541.

OCTOBER TERM, 1919.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

ALASKA STEAMSHIP COMPANY ET ALS., Appellees.

BRIEF FOR CARRIERS (APPELLEES).

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DECEMBER, 1919.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919. No. 541.

United States of America and Interstate Commerce Commission, Appellants,

vs.

Alaska Steamship Company, et als., *Appellees.*

BRIEF FOR CARRIERS (APPELLEES).

FIRST POINT

The Commission has no authority to draw the carriers' bills of lading.

(*Assignment of Errors I, II, III, IV, VI, VIII.*)

The Petition (IV) alleges:—

> "By existing tariffs the carriers offer to perform carriage under common law liabil-

> ity, unmodified except by applicable statutes or, in the alternative, under liability measured and defined by the bill of lading adopted and issued in 1912 at the recommendation of the Interstate Commerce Commission. Shippers are free to choose either liability. If the shipper chooses the liability measured by the bill of lading, the tariff charge for the transportation is approximately 10 per cent. less."

History of the Present Bill.

The bill of lading alluded to in the petition was originally recommended in the interest of uniformity by an order of the Commission of 1908, In the Matter of Bills of Lading, 14 I. C. C. 346, as appears from the report of the Commission which accompanied the recommendation of 1908. The bill had been drafted after investigation and conference by a joint committee of shippers and carriers, and represented, as the Commission then said, "in most, if not all, of its principal features a virtual agreement between shippers and carriers." Further the Commission said of the bill:—

> "It is, of course, more or less a compromise between opposing interests, because on the one hand it imposes obligations of an important character which carriers have not heretofore assumed, and on the other retains exemptions to which some shippers may object, and perhaps not without substantial reason. As we are advised, it is in some

> respects less favorable to the shipper than the local laws or regulations of one or more states, but is more favorable to the shipper than the local laws or regulations of most of the states. On the whole, it is believed to be the best adjustment which is now practicable of a controversy of long standing which affects the business interests of the entire country."

That bill recommended by the Commission was incorporated in the Official and Western Classifications, where it remains with some modifications which followed the enactment of the Carmack and Cummins Amendments. In the alternative, carriage was offered in these classifications at increased rate "under the liability imposed upon common carriers by the common law and the Federal and state statutes applicable thereto." This theory of rate alternative was approved by this Court in Chicago & Alton R. Co. *vs.* Kirby, 225 U. S. 155, a suit for special damages arising out of breach of a contract for expedited transportation. This Court said: "for such a special service and higher responsibility it" (the carrier) "might clearly exact a higher rate."

Clear grant of Power must be shown.

The Commission's order, which is the subject of the present litigation, would require carriage at *higher* than legal liability (under the common and statute law) for the *lower* rate.

The picture is of a bargain between the shippers and carriers. In that bargain the carriers offered to undertake obligations more onerous than the law required in consideration of the relief clauses to which the shippers agreed. There was no thought then (1908) that the Commission could write the contract. An illustration of an important concession made by the carriers in the bill of 1908 and again offered in the proposed carriers' bill in the present case (Tr. page 81) was the clause by which the carriers offered to assume the burden of disproving negligence even as to causes which were excepted, such as riots and strikes, etc. This matter of burden of proof under a bill of lading in interstate commerce is a Federal question which "must be resolved by an application of general principles of the common law:" Railway Co. *vs.* Prescott, 240 U. S. 632. The Commission in writing the contract has struck many important clauses in favor of the carriers but left standing the obligations which the carriers were voluntarily ready to assume in consideration of the reliefs. The result of Commission action is thus one-sided. Indeed, the function of the bill of lading is to express the contract between the shipper and carrier upon which the minds of the parties have met. A Commission, or court, has no place in this office.

No statutory grant to Commission to prescribe bill of lading.

We suggest these underlying considerations as preliminary to the jurisdictional question now to be presented.

The jurisdictional question is how far the substantive duty of the carriers as to Bills of Lading under Section 1 has been, or could be, carried into a grant of correlative power in the Commission. We print in parallel columns the substantive provision of Section 1 and the part of Section 15 as to power on which the Commission relies:

§1—*The Duty.*	§15—*The Commission's Power.*
Railroads are required "to establish, observe, and enforce * * * just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading" which expression of the carrier duty is then followed by a prohibition as "unlawful" of "every such unjust and unreasonable classification, regulation, and practice."	The Commission is authorized "To determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the

> same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Of this part of Section 15 the opinion of the District Court (Tr., p. 100) says:—

> "All this refers to rates, classifications, regulations and practices. That the Commission has power under Section 12 of the Act to investigate as to the fairness of the carriers' bills of lading we have no doubt, but we discover nowhere any authority conferred upon it to draw the carriers' bills of lading either in whole or in part."

"Practice" does not include bills of lading.

Before the amending Act of June 18, 1910 (36 St. at L., 539), the Commission's jurisdiction was (Section 15) of "classifications, regulations, or practices whatsoever * * * *affecting such rates*," and by that act the italicized clause was struck out. This amendment gave the power to the Commission, as to practices, to prescribe, after hearing and upon proper evidence, a "practice"

which "is just, fair, and reasonable." But as the District Court has said (Tr., p. 100) this does not give authority "to draw the carriers' bills of lading either in whole or in part." Before the Act of 18 June, 1910, the practice to be cognizable by the Commission must have affected the rates themselves, and now the practice must have some relationship to the associated matters. In the Matter of Stopping Cars in Transit to Complete Loading, 36 I. C. C. 130, a case decided after the Amendment, the Commission thus expressed (page 132) its jurisdiction conferred by Section 15 as amended in 1910: "'Rate,' 'fare,' and 'charge,' broadly speaking, denote the compensation of the carrier; 'classification,' 'regulation,' and 'practice' are merely incidents of a rate, fare, or charge which serve to determine the amount, availability, or elasticity thereof, or of the value of the whole service rendered."

This court has defined the effect of the amendment of Section 15 of the Act of 1910 in the Tank Car Case (242 U. S., at page 229) thus:—

> "The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a 'practice' within the meaning of Section 15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as 'practice.' Following a well known

> rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one."

The practice which the Commission may determine is a practice like a classification or regulation, such as would burden transportation or cause discrimination, and like matters. In the bills of lading prescribed by the Commission's order many matters were covered which had no relation to burdening transportation, which could not favor the large shipper and oppress the small one or otherwise be unjust, unfair or unreasonable as "practices" in the connotation of that word in Section 15. Instances of features of the bill of lading as ordered by the Commission which are unrelated to the business of carriage as such and are therefore not practices within the definition of this court are: eliminating the Riots and Strikes clause: discharging liability of consignee for freight money under defined circumstances: and enhancing initial rail and direct water line liability and forcing the carriers to assume by contract higher liability for initial rail and direct water carriage than is provided by the Harter Act and other applicable law.

The jurisdiction of non-carrier facilities.

In G. N. Ry. *vs.* Minnesota, 238 U. S. 340, this Court overruled an order of a State Commission directing a railroad to furnish a track scale and pointed out that the order was arbitrary in seeking to eliminate a discrimination "by peremptorily requiring construction of another" (scale) "without giving opportunity to accomplish the same result through discontinuing the use of those already installed." The jurisdiction of the State Commission did not extend to the control of the non-transportation convenience and was limited to directing that a resultant discrimination, if found, should cease.

Any discrimination resulting from a disregard of the duty created by the 1st section in respect of bills of lading, would be cognizable by the Commission. If anything in the bill of lading was used so as to produce an unlawful discrimination or preference, then the Commission would have jurisdiction after hearing to order that discrimination or preference to cease.

But the Commission (52 I. C. C. 685-686) says:

> "Thus the Commission has power and authority under the act to determine the reasonableness of rules, regulations, and practices of the carriers, and to require them to cease and desist from the enforcement of rules and

> regulations, and the continuance of practices found to be unreasonable or unjustly discriminatory, or unduly prejudicial. And herein lies the Commission's power to lay hands upon the 'issuance, form, and substance' of bills of lading."

Jurisdiction of practices "affecting" substance confers no power to prescribe substance.

Here we have the argument that the word "practices" as occurring in Section 15 relates back to the same word as occurring in Section 1, and the Commission thinks that power from "any practices whatsoever" by reference back to Section 1 expands by inference the Commission's power over practices "affecting" the substance of bills of lading and by a further inference gives power over the substance itself. We think this argument unsound, but in any case it does not go far enough to support the Commission's action here. The Commission's position requires a determination of the meaning of the word "affecting" as used in Section 1 of the Commerce Act. A practice affecting the substance of bills of lading, to which Congress had reference in Section 1 might be the manner in which the terms of the bill of lading should be printed on the document, or posted in the stations, so as to bring them to the notice of shippers. A practice affecting the substance might also be illustrated by the requirement that order-notify bills

should be printed on yellow paper. But the Commission asserts that jurisdiction of practices *affecting the substance* of bills of lading is equivalent to a grant of power over the *substance* of the bill of lading itself. Congress, however, used this word "affecting" advisedly. This appears from the grant to the Commission of (*a*) power over rates and (*b*) by an additional separate grant, power over any "practice affecting any rate"—Paragraph 2 of Section 15. So power over practices affecting the substance of a bill of lading is outside of and not over the substance of the bill of lading itself.

The Commission's view of the scope of its power would include authority to prescribe the liability a carrier must assume to its passengers. Thus the 1st section of the Act required "just and reasonable regulations and practices affecting * * * the issuance, form, and substance of tickets." Ordinarily the ticket includes provisions regarding the liability of the carrier. If the power of the Commission to regulate "any practices whatsoever" includes tickets, it would follow that the Commission has the right to regulate liability in tort to a passenger. This association of tickets with bills of lading in Section 1 of the Commerce Act is another weighty circumstance as indicating that the regulatory Commission created to deal with and prevent discrimina-

tion, preferences, etc., was not intended to have authority over the foreign field of tort which is covered by our system of jury trial as required by the Seventh Amendment. But the Commission itself has rejected tort jurisdiction: Conference Ruling of I. C. C. 127.

Regulation of substance by Congress exclusive.

That Congress did not intend to intrust regulation of the substance of bills of lading is demonstrable also by the fact that Congress itself regulated that substance specifically. Thus in the Cummins Amendment the Congress regulated notice of claim required by bills of lading; and gave the Commission authority to base rates on value in designated cases and has thus definitely indicated the limits of the Commission's authority. And by the Pomerene Act relating to bills of lading (39 St. at L. 538, Act of August 29, 1916) Congress in still further detail regulated the substance of bills of lading. In this Act Congress forbade any provision in an order bill of lading that the bill is non-negotiable unless agreed to by the shipper (Section 3). So, too, by Section 21 the carrier is permitted to insert in the bill of lading the familiar phrase "Shippers' weight, load and count," and is thus allowed to contract that it does not underwrite quantity. The title of the Pomerene Act is "An Act Relating to Bills of Lad-

ing in Interstate and Foreign Commerce," and the first section expresses the intent of Congress "that bills of lading issued by any common carrier for transportation of goods" in interstate or foreign commerce "shall be governed by this Act." The Act also by Section 4 forbids the issue of order bills for continental use in parts or sets, and by Section 8 regulates a practice of delivery of the goods by the carrier. Also the Harter Act regulates (27 St. L. 445, Act Feb. 13, 1893) vessel "bills of lading." This regulation by Congress is by its very terms complete, exclusive and consistent only with the theory that the Commission does not have jurisdiction over the substance or over practices affecting the substance of bills of lading in and of themselves; but always with the limitation in mind that some resultant preference or other illegality could be redressed by the Commission.

The truth is that if Congress had intended to vest in the Commission a power correlative with the obligation in Section 1 as to bills of lading we should have found the grant of power in clear, unmistakable language like that employed in creating the duty. But only the word "practices" occurs in Section 15, without the phrase covering matters affecting the substance of bills of lading. As this Court said in The Tank Car Case, this important power would not have been

"ambushed in obscurity and suddenly disclosed by construction."

For purpose of test, suppose the carriers had issued without alternative of rate a bare receipt for goods to be carried to a named destination comparable to the familiar baggage check (see B. & M. R. R. *vs.* Hooker, 233 U. S. 97), the conditions of carriage would then have been subject to law. Could the Commission have deemed the receipt unreasonable on the ground that it did not increase the carrier's common-law liability? To the extent that heavier than legal liabilities are imposed by the Commission's bill of lading this is in effect what has been done. The Commission has declared legal conditions unreasonable and essayed to change the law by exercise of administrative function.

No power conferred by Section 12.

Section 12 of the Act, giving the Commission power "to execute and enforce the provisions of this Act," is also invoked by the Commission as authority for its action, but (see I. C. *vs.* C., N. O. & T. R., 167 U. S. 479, Harriman *vs.* I. C. C., 211 U. S. 407, and the Tank Car Case, 242 U. S. 208) has been determined not to have the effect of creating a power to enforce a particular duty.

Prescribing bill of lading not an administrative matter.

The argument for the Commission (page 18) disregards the limitation placed upon the word "practices" in Section 15 and in the enforcement provisions of Section 12 by this court in the cases last cited. The brief on this point asserts that a practice includes prescribing the bill of lading as an administrative matter. The brief then (page 18) states the consideration solely of result which is deemed by the Commission controlling in the following language:

> "If the courts may not determine these administrative questions, as this court has clearly held, then the requirements of the act hereafter quoted as to bills of lading must be without any tribunal to enforce them if the Commission does not possess that power."

The argument is one of result only. The result is stressed that if the Commission cannot prescribe substance of bills of lading, then there is no tribunal to enforce the duty in Section 1. But this is a mistake. Any carrier duty created by Section 1, if not committed to the Commission expressly, is enforcible in the common law courts, as was explained by this court in the Tank Car Case (242 U. S. at page 227). There this court said that under the Commerce Act of 1887, and the amendment of 1906, it was the "duty" of the carriers "to furnish the instrumentalities of trans-

portation", and the court added that the question before the court under the amendment of 1906 was whether, as under the original act, "jurisdiction to enforce the duty was at common law in the courts or under the statute and in the Commission."

Indeed the Commission could not be clothed with power to prescribe a new bill of lading, except in accordance with standards set by Congress. If Congress attempted to confer authority to formulate and prescribe a bill of lading without indicating the standard to which the provisions thereof should conform, this would be an unconstitutional delegation of legislative power: O'Neil *vs.* Insurance Co., 166 Pa. 72.

It being necessary, therefore, that Congress furnish the Commission with standards for its guidance in its consideration of the conditions of the bill of lading, it follows that due process requires that the Commission shall apply these standards, after hearing, in the light of evidence, just as the Secretary of War for example, in passing upon the height of bridges which may interfere with commerce, is required to hold hearings and to determine the controversy in accordance with the standards specified in the Act of Congress governing this matter: Union Bridge Co. *vs.* U. S., 204 U. S. 364.

So no provision of the Act authorizes the order.

SECOND POINT.

The Carmack-Cummins Amendments do not repeal the Harter Act and kindred Acts as to water borne traffic in connection with rail.

(*Assignment of Errors IV, VI and IX.*)

What is the effect of the Carmack-Cummins Amendments upon the right of the carrier to avoid, by contractual provisions, a liability which otherwise would exist? And what is their effect on the Harter Act and like legislation?

The original Carmack Amendment (34 Stat. at L. 584) was interpreted as requiring the issue of a receipt or bill of lading and establishing an exclusive federal rule of liability: Adams Express Co. *vs.* Croninger, 226 U. S. 491. The Federal rule (Hart *vs.* R. R., 112 U. S. 131) permitted agreements for less than the actual value. This resulted in the Cummins Amendments (38 Stat. at L. 1196; 39 Stat. at L. 441) which was intended to invalidate agreements by carriers limiting the amount which might be recovered in case of loss or damage for which they might be liable to something less than actual value. In neither Cummins Amendments is there any evidence of intention to alter in any way existing rules with respect to the right of the carrier by contract to modify its common law liability by relieving itself from liability for loss or damage which it *did not cause*. In short,

Congress held throughout these amendments a clear distinction between contracts of the carrier *exempting* itself from liability for certain *causes of loss or damage* and contracts of the carrier *limiting* the amount of recovery to certain specified amounts which might be less than the actual value.

The Cummins Amendment, in denying to the carrier the right to exempt itself from liability for loss, damage or injury *caused* by it, declares by inference that for loss, damage or injury not caused by the carrier, in other words, for loss, damage or injury not attributable to its fault, the carrier is not liable. For a regulation of commerce is as firm in negative as in positive aspect: R. R. *vs.* Winfield, 244 U. S. 147.

Accordingly *the Water Carriage Acts are not repealed.*

The Commission (52 I. C. C. at p. 726) takes the position that "A water carrier under an arrangement with a railroad for common control and continuous carriage or shipment" cannot rely upon the Harter Act, the Fire Act, the Limited Liability Act, because this "would be in contravention of the Cummins amendment, and therefore null and void."

The appellants' brief makes no argument in justification of the Commission striking the water

carriage clauses from the inland bill of lading. Point VIII of appellants' brief headed "The Elimination of Clauses Protecting Water Lines" appears to deal only with the export bill of lading concerning which the carriers have not made so strong a complaint, inasmuch as the water line provisions and others which the carriers consider they have the right to stipulate for as being just and proper were not wholly eliminated. The only reference to elimination of these important provisions from the inland bill appears to be on page 42 of the appellants' brief where it is stated:

> "For this reason the Commission has permitted certain provisions to remain in the export bill limiting the carrier's liability where like provisions are excluded from the domestic bill. The discussion of this question by the Commission is found in its report (pp. 726-740)."

We are not certain whether the appellants by thus omitting to discuss the elimination of the water carriage clauses from the inland bill are content to abide by that part of the District Court's opinion wherein Judge Ward said (Tr. p. 111):

> "In any event, there was no power to prescribe an inland bill of lading in form or substance depriving the carriers of the benefits of the statutes limiting the liability of

> vessel owners and of the Harter Act. These Statutes still survive unless repealed by implication, and this result we are of opinion was neither intended nor accomplished."

Therefore we shall discuss the proposition stated by Judge Ward as if it were contested by the appellants.

Preliminarily it should be noted that the Commission in its report did not particularize in what respects the water carriage provisions stricken from the inland bill of lading were illegal, except that at page 725 of its report it stated: "Many of the exemptions proposed to be incorporated in this section for the benefit of carriers by water would be in direct violation of the provisions of the Cummins Amendment." In its discussion of the export bill at page 736 the Commission says: "We are convinced that many of the stipulations in respect of the water carriers' exemption from liability proposed in their behalf are unreasonable and indefensible, and, in many instances, in violation of the law."

The Commission does not indicate the particular clauses, which are alleged to violate the law. The clauses and provisions contained in the inland bill as proposed by the carriers are the same clauses and provisions carried in their bills of lading for very many years and are in substance the same as those found in the bills

f lading of all ship-owners doing business to r from or between the ports of the United States. Under our law no exemption from liability is ffective unless the carrier is free from negli- ence.

Among the provisions stricken from the inland ill by the outright elimination of Sec. 9 is the eneral average clause equivalent to that which as upheld by this court in The Jason, 225 U. S. 2.

We believe that examination of Sec. 9 as pro- osed by the carriers (See Appendix under eparate cover filed with this brief) will disclose o provision in violation of law.

limination of statutory protection.

By eliminating the customary water clauses rom the bill of lading the Commission has re- uired the carriers to assume by contract liabilities rom which they have long been exempt by Stat- tes. Section 4281 of the Revised Statutes re- eves the shipowner in certain cases from liabil- y for precious metals, jewelry and other valua- les. Section 4282 of the Revised Statutes re- eves the shipowner from liability for dam- ge caused by fire on board unless caused by the esign or neglect of the owner. Section 4283 and ollowing limit the liability of the shipowner o the value of the vessel after the disaster

and her freight then pending. The Harter Act relieves the shipowner who has used due diligence to make the vessel seaworthy from liability for loss resulting from faults or errors in navigation or in the management of the vessel and also for loss arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect in quality or vice of the thing carried or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

These statutes express the policy with respect to shipping inaugurated by Congress in 1851. They have always been availed of by shipowners. Water line bills of lading containing appropriate provisions to give the shipowner the benefit of these acts of Congress have been in universal use, and the bill of lading recommended by the Commission in 1908, 14 I. C. C. 346, provided in Section 9 that the water carrier should have the benefit of the statutory limitations of and exemptions from liability and should also have the benefit of other specified exceptions appropriate to the hazards of water transportation.

But the bill of lading now prescribed by the Commission begins by making the carrier of property **"liable for any loss thereof or damage**

thereto, except as hereinafter provided". In view of the assumption of liability thus enjoined it is apparent that the water carrier under the prescribed bill would by its own waiver be deprived of the benefit of the acts of Congress.

It is well settled that the above named statutes, being for the benefit of the carrier alone, may be waived by it. Language better calculated than Section 1 to effect a waiver could hardly be employed.

D'Utassy *vs.* Mallory S. S. Co., 162 App. Div. 410, 147 N. Y. Supp. 313;
The Hoffmans, 171 Fed. 455, 462-463;
The Satanita [1897] A. C. 59;
Ingram & Royle *vs.* Services Maritimes du Treport, L. R. 1914, 1 K. B. 541, 550-553.

Commerce Act itself preserves water statutes.

Section 15 of the Act to Regulate Commerce, on which mainly the Commission relies for its power, contains the express declaration that **"any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water":** 36 St. L. 552. It is not to be presumed that the statutes governing water carriage were repealed by implication for "Congress would have used language adequate to that purpose," if Congress had "in-

tended" a purpose so "sweeping":—U. S. *vs.* L. & N., 236 U. S. 318, at page 336; and it has been held that the initial carrier has the benefit of the federal statutes when the loss is in the hands of a connecting water carrier. The Hoffmans 171 Fed. 455; Brinson *vs.* Norfolk Southern R. R. Co., 169 N. C. 425; Burke *vs.* Gulf C. & S. F. Ry. Co., 147 N. Y. S. 794.

The Commission's attempt to deprive water carriage of its statutory exemptions would result in imposing an additional burden upon the initial carrier by rail. As initial carrier, it would become liable by virtue of the Carmack-Cummins amendments for losses at sea within the statutory exemptions and limitations. The Courts have held that the initial rail carrier is not liable under the Carmack-Cummins amendments beyond the liability of the water carrier which caused the loss. The liability imposed upon the initial rail carrier by the Carmack-Cummins amendments as determined by the courts is thus increased by the action of the Commission in depriving the water carrier of the benefits of the statutes.

Authorities holding initial rail carriers may avail of water statutes.

In the Hoffmans, *supra,* the National Harvester Company sought to recover from the Railroad Company the value of certain twine lost by fire on one of the Railroad Company's

barges in New York Harbor. The Railroad Company petitioned the District Court for the Southern District of New York to limit its liability to the value of the barge, which petition the Harvester Company contested. The District Judge said, 171 Fed. Rep. 455, 465-466:

> "The Interstate Commerce Act aimed to correct certain abuses in the carriage of goods, principally by land, incidentally by water, but it was certainly not designed to overthrow the long established system of limitation of vessel-owners' liability in connection with water carriage. To suppose so, without any mention of the Act of 1851, would be a perversion of its obvious intent to correct the said abuses. I do not find any merit in the claim."

In Brinson & Cramer *v.* Norfolk Southern R. Co., *supra,* 17 crates of eggs were shipped in January, 1914, from Belhaven, N. C., to New York over the Norfolk Southern Railroad to Norfolk and thence to New York by the steamship Monroe of the Old Dominion Steamship Company. The Monroe with all her cargo was lost at sea by collision. Suit having been brought against the Railroad Company as initial carrier the Supreme Court of North Carolina held that the Railroad Company was entitled to the benefit of any defenses which the water carrier, the Old Dominion Steamship Company, could have availed of. Hoke, J., said (169 N. C. 425, 427):

"And from a perusal of the language of the statute, making the initial carrier responsible for injury caused by it or by any connecting carrier, and from the provision also contained in the amendment for recoupment by the initial carrier or any other or connecting carrier actually causing the loss, etc., we concur in the view of well considered cases on the subject that, although the initial carrier may be by rail, if any connecting company along the designated or usual route of shipment, there being no route designated, is a carrier by water, and the loss or injury occurs by the wrong of such company, the initial carrier may avail itself of the federal legislation applicable to transportation companies of that character, limiting the *quantum* of recovery in certain instances, and at times relieving of responsibility altogether; the principle being that, in cases coming within the effects of the law, the initial carrier, so far as the shipper is concerned, is held to have contracted for through transportation, and is liable for the default of itself or any connecting carrier, and may avail itself of any defenses or of limitations of liability open to the carrier causing the loss."

To the same effect is Burke *vs.* Gulf C. & S. F. R. Co., *supra*, where 31 bales of cotton were delivered to the Railroad Company at Cleburne, Texas, to be transported to Galveston and thence to be transported to New York by the Mallory Steamship Company. At New York the cotton was damaged by a fire on one of the Steamship

Company's lighters. Action having been brought against the Railroad as initial carrier the Court said 147 N. Y. Supp. 794, 799:

> "A loss occurring without the design or neglect of the carrier cannot in any sense be said to have been caused by such carrier, and for this reason a loss caused by a fire on a vessel of a connecting carrier without its design or neglect by which it is relieved of liability by the provisions of sections 4282 and 4289 of the United States Revised Statutes, cannot be said to be a loss for which the initial carrier is liable. These sections are available as a defense to the water carrier notwithstanding the carriage may be under a through bill of lading. * * * Being available to the connecting carrier, which is the agent of the initial carrier, they are also available to the latter."

The same principle is stated in Riverside Mills *vs.* Atlantic Coast Line R. Co., 168 Fed. Rep. 987, also 168 Fed. Rep. 990, (affirmed by this Court 219 U. S. 186), where the Railroad Company was sued as initial carrier for the loss of goods shipped from Augusta, Georgia, to the Pacific Coast. Answering the contention that the carrier was deprived of due process of law by being held for the loss of goods on another line, Judge Speer said, 168 Fed. Rep. 989:

> "He can make any proper defense, which may be made in a court of law, and which any other connecting carrier might make,

wherever the goods are transported, or wherever the loss or injury occurred. If the loss occurred from the act of God or from the country's enemies, for instance, on a section of these intercommunicating lines somewhere between here and the point of destination, or was otherwise capable of defense, this railroad would have the privilege of making such defense here."

Mistaken theory of dissenting opinion in District Court.

As for repeal of these laws by the Carmack-Cummins Amendments perhaps the position of the Commission has nowhere been put more bluntly than in this extract from the dissenting opinion in the District Court—

"The final question is the elimination of the customary clauses which protect the water lines on the theory that the Carmack and Cummins amendments override the Harter Act and those other acts specifically affecting shipping. So far as concerns the statute limiting the liability of ship owners, it seems unnecessary to hold that the amendments have this effect. They only provide that the carriers may not exempt themselves from their duties by contract. While the carrier remains liable notwithstanding that contract, the extent of his liability is still subject to the provisions of all other positive law. It is true, of course, that the result may be that the initial carrier is liable generally and has only a limited recourse over against the water carrier. If this be an injustice, it is one which arises from the liability statute and not from the Carmack and Cummins amendments.

> "As to the Harter Act, however, I can see no escape from the conclusion that there is a conflict between it and the amendments, in which the earlier statute must yield."

But in the Harriman Case (227 U. S. 657) this Court said of the Carmack amendment:

> "The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence."

And the Cummins amendments merely added a liability "for the full actual loss, damage, or injury to such property caused by it or by any" connecting carrier "notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value." Now as under the Carmack amendment the carrier may avoid by contract liability for any damage *not caused by it.*

The dissenting opinion in the District Court declared that the statute limiting the owner's stake to the value of his vessel (or salvage) was not repealed, and said:

> "It is true, of course, that the result may be that the initial" (rail) "carrier is liable generally and has only a limited recourse over against the water carrier."

This theory of the dissenting opinion would have the result that Congress, in enacting by the Carmack-Cummins Amendments that the initial carrier held liable for a loss on connecting water line should have a right of recovery over against the connecting carrier, was as to the Limited Liability Statute doing a vain thing. According to the dissenting opinion an initial rail carrier would be held liable without right of recovery over against the water carrier for a total loss of vessel and cargo. By this construction the water carrier sued by the shipper could defend on the Limited Liability Statute and the initial rail carrier could not defend upon that statute. The Carmack-Cummins Amendments would thus be given the effect of repealing the Limited Liability Statute as to the initial rail carrier and leaving that statute in effect as to the water carrier. Congress would not have dealt so disingenously with the subject if repeal of the sea carriage laws had been intended. A simple three line statute referring to those laws and repealing them would have been passed. The truth is that Congress was not dealing with water liability as such at all in enacting the Carmack-Cummins amendments. And so far as water liability has been dealt with at all, it is provided in Section 15 that transpor-

tation by water is "subject to the laws and regulations applicable to transportation by water"—36 Stat. L. 552. All the authorities are opposed to the position taken in the dissenting opinion.

Differing circumstances of water lines require preservation of their exemptions.

The dissenting district judge was impressed with considerations *ab inconvenienti* and phrased the point thus in his opinion:

> "Moreover, if one considers the effect of the interpretation which the petitioners desire, its meaning is much reinforced, for the Act and its amendments were an elaborate effort to produce a comprehensive and equitable regulation of transportation, both by land and by land and water, and it can hardly be supposed that provisions like the Carmack and Cummins Amendments were intended to subject railroads to one kind of obligation and the connecting water carriers to another. At least, no valid reason suggests itself for such a distinction when all had been free before those amendments to protect themselves in exactly the same way."

The fact is that the water-borne part of the traffic was always subject to water law. Congress had differentiated between the water and the rail part of the joint haul in respect of liability. In making this distinction Congress was following out its policy since 1851 and was recognizing the

different circumstances of land and water-borne traffic. The dissenting Judge's suggestion that Congress did not intend "to subject railroads to one kind of obligation and connecting water carriers to another" fails to recognize the perils of the sea and other circumstances and conditions which differentiate the water-borne from the rail part of the haul. From these circumstances and conditions arose the laws stating the rights of ship-owners and giving them now time-honored exemptions which they are entitled to preserve by contract—or certainly are entitled not to be compelled to contract away.

Indeed, the unfairnesses which would arise if this water traffic carried in connection with rail is subjected to insurance liability of the land carriers appear strikingly if we remember that the water carriers which will be deprived of the protection of the Harter Act and similar legislation will be those which voluntarily or by order of the Interstate Commerce Commission have united in offering to the shipping public the additional facility of regular service under fixed joint water and rail rates filed with the Interstate Commerce Commission. Railroad owned ships would also be affected. The water carriers not so operating will still have the protection of the Harter Act and similar legislation. The effect of the dissenting Judge's theory of repeal of this great group

of important laws would be to penalize those water carriers which have joined or been required to join with rail carriers in through routes and rates—to penalize the offering to the public of this greater convenience.

At this time, when ship effort is vital to the country and the necessity of developing our merchant marine is recognized on every hand, the suggestion that an important part of our marine service should be placed at a serious legal disadvantage and the operating cost of that service largely increased must find clearer support in law than mere inference or construction.

THIRD POINT

The Carmack-Cummins Amendments do not preclude a provision by which the value at place and time of shipment measures a loss.

The problem is to find value. Value is not a mere abstraction, and, like other finite things, must be ascertained as of a given time, place and person. To prescribe a rule to ascertain this value the carriers propose (Transcript, page 49) a clause in Section 2 (as 3) as follows:

> "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the actual value of the property at the place and time of shipment under

> this bill of lading, including the freight charges, if paid; and where the actual value of the property has not been required to be specifically stated by the shipper in this bill of lading, such actual value shall be arrived at from the bona fide invoice price, if any, to the consignee."

The Commission contrasted this proposed clause with the Cummins Amendments (Act of 4 Mar. 1915, 38 Stat. at L. 1196 and Act of 9 Aug. 1916, 39 Stat. at L. 441) which declare that the carriers shall be liable

> "for the full actual loss, damage, or injury to such property caused by it or by any such common carrier * * * to which such property may be delivered * * *, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

And then found as matter of law that the Cummins Amendments are in conflict with the ascertainment of value at origin.

The Commission after referring to McCaull-Dinsmore Co. *vs.* Railway, 252 Fed. 664, says (52 I. C. C., at page 711):

"The proposed" (origin value) "rule, being superfluous so far as concerns the transportation of property shipped under rates dependent upon declared or agreed values, and unlawful and void in respect of all other property, we condemn it and direct its complete elimination from the proposed bill."

Destination value not exclusive at common law.

This is merely a statement of the conclusion that there is conflict between the origin value clause and the Cummins Amendment of Section 20 of the Act to Regulate Commerce. In order to see the reasoning upon which the conclusion rests we must look to the McCaull-Dinsmore decision. The court in that case states that "the foundation of the common-law rule" is destination value, and the Circuit Court of Apeals in affirming the judgment made the same mistake of taking an application of the rule for the rule itself.

The brief for the Commission (page 37) falls into the same error in asserting that "the common law rule was and is that in case of such loss the damages are to be measured by the value of the property at the point of destination."

No party to the contract of affreightment can at the common law recover more than his damage. If the consignor is vendor of the shipment be could recover the origin value because this is what he

lost. The argument in the Commission's brief first assumes the incorrect major premise that the common law excludes every value as a basis of recovery except destination value and then proceeds to the incorrect conclusion that destination value —asserted to be the *only* value—is limited by the origin value clause in contravention of the Cummins amendments.

But this it not the law. Like the rule of damage in all actions of assumpsit the common law rule of damages for loss or injury to goods under carriage is to make the injured party whole, excluding speculative, special or nonexpectable damages. In Section 1261 of Hutchinson on Carriers (3d Ed.) the statement is made that this destination rule of damage "is by no means an inflexible rule." Hutchinson points out that destination value is proper "when the owner of the goods himself is to take them at their destination, there to use or to sell them on his own account." But he adds that if the goods have been consigned to another "who is to take them at a price which the owner has fixed upon them * * * the owner could recover as damages for their loss no more than the price which he had himself fixed upon them, with interest"—in other words, the origin value.

A leading case which applies the general rule of making the injured party whole is Magnin *vs.*

Dinsmore, 62 N. Y. 35. In that case the court said (page 45):

> "Though a rule is sometimes stated thus: That the damages are the value of the goods agreed to be carried and delivered at the place and time of delivery; that rule is but a branch of the more general one, that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of a contract."

Value at destination is usually arrived at by taking the price actually paid at origin for the goods, plus freight. Other elements, such as overhead of the consignee, loss of profits during delay and other speculative, nonexpectable elements of actual damage have been excluded.

Justification for origin value rule.

The practical considerations give support to the origin value rule.

First.—Discrimination. For the same commodity, moving on the same date between the same points, a different amount will be paid if the commodity is lost. Two shipments of coal move from the mine to the same point of destination;—one to "A" who has incurred a broker's commision, and the other to "B," who has been more forehanded and avoided this cost of distribution. The mine price to both was the same.

"A" would be paid the cost of the coal, plus the commission, and "B" will be paid the cost of the coal without the commission. There is also the familiar case of double commissions on the same sale where the first shipment is lost.

Second.—The carriers would in destination value be called upon to pay speculative elements of cost of distribution, such as overhead, increased value while rolling, &c. The factors are much disputed.

The instance given in the brief for the Commission (page 38) of a car of grain which went astray and was substituted by another car purchased in destination market is an illustration of one of the mischiefs of selecting destination value as the measure of carrier liability. The carrier was required to pay an element of value which had no existence at the time the contract of affreightment was entered into because (brief of Commission, page 38) "the price of grain" had "advanced." Such a speculative element while rolling had nothing to do with the limitation of true or actual value which the Cummins amendment was enacted to enforce.

The Commission itself deems the origin value rule a reasonable one because it has approved that basis for the inland part of the ex-

port bill. But, deeming the matter foreclosed as to interstate commerce and commerce to adjacent countries by the Carmack-Cummins Amendments, the Commission has refused to exercise its administrative authority which, if the Commission deemed itself to possess that authority in this connection, would evidently have been exercised in favor of the origin value basis. This was a mistake of law by the Commission which should be enjoined as in cases like L. & N. R. R. Co. *vs.* Behlmer, 175 U. S. 648.

In Shaffer *vs.* Railway, 21 I. C. C. 8, the Commission said:

> "This contract makes no attempt to exempt the carrier from liability for the full value of the commodity transported, nor does it in any way limit the carrier's liability to a sum less than the value of the commodity. It is merely a contract between the parties fixing the time, place, and manner of arriving at the value of the property."

The State courts prior to the passage of the Carmack amendment have enforced clauses fixing origin value in bills of lading as against the argument that their effect was a forbidden limitation of the carrier's common law liability. In Rogan *vs.* Wabash Ry., 51 Mo. App. 665, the court characterizes such a clause as an agreement "liquidating the damages in case of loss

or injury" which will be upheld: In Shaffer *vs.* C. R. I. & P. Ry. 185 Ill. App. 615, the court followed the rule the Interstate Commerce Commission had announced and held that such a contract does not limit liability for the full value.

The same considerations led the Commission to approve the origin value rule in a tariff in the report on the Cummins Amendment, 33 I. C. C. 682, see page 693.

A late case is Springfield Light, Heat & Power Co. *vs.* N. & W. Ry. Co., decided by Judge Hollister June 11th, 1919, in the District Court of Ohio, 260 Fed. 254. There coal had been taken for fuel by a railway. The commodity coal tariff provided that the amount of any loss or damage for which any carrier shall be liable shall be computed on the basis of the value of the property at the time and place of shipment. The case was argued upon the Carmack-Cummins Amendments and the court held that the statute did not invalidate the tariff. The Court said:

> "This demurrer will be overruled also, for the reason that the published terms of defendant's coal tariffs in effect at the time, filed with the Interstate Commerce Commission and published according to law, fix the measure of damage for loss or damage on the basis of the value of the property at the place and time of shipment. Of course, the tariff rates are measured by the value of the service. The published rate is on the basis of the value

> of the coal at the mine. A greater value than that would call for a higher rate than the published rate. To permit the plaintiff to recover for a greater value than at the mine, while paying the same rate as other shippers, would be a discrimination in favor of the plaintiff."

Only one value.

The inhibition of the Cummins Amendments is "as to value." The word, as appears from the context of the statute, is used as synonymous with "the full, actual loss, damage or injury to such property". Note the use of the definite article to designate the particular loss in each case. Not *any* or *every* loss, but *the* loss can not be limited. Congress had in mind that each case would present the same problem. Congress was not contemplating that the same loss might present several differing values according to the angles from which the claim was viewed. The consignor's loss would be ascertained by his invoice; the consignee's might include elements of cost in distribution at destination, loss on a resale, &c. But Congress said that *the* loss must be paid and could not be limited. Congress did not say that the highest loss to any person interested in the transaction should be ascertained and paid.

The actual value and the consequent recovery can not be limited. The contract to limit value or to limit recovery of that value would be void. In

either form the statute forbids this element of the contract. Now the value at the time the carrier receives the article for transportation, is a true value, and hence the origin value clause expresses and does not limit the value. The value at time and place of shipment does in fact express all of the loss in contemplation of the parties when the contract of affreightment is made.

There are in the Cummins Amendments evidences that Congress was thinking of value as origin value. In that part of the last Cummins Amendment which authorized the Commission by order to establish rates dependent upon value the expression of the statute is "the value declared in writing by *the shipper,*" etc. It seems justifiable to say that Congress used the word "value" throughout this statute to express the same idea. The sentence quoted from the rate part of the statute is suggestive that the shippers' (or origin) value is a true value. Only by adhering to origin value will the mischiefs of discrimination, such as were condemned in Kirby's case, 225 U. S. 155, and the difficulties, graver from the carrier viewpoint, of determining the true factors of a loss, be avoided.

The legislative history of the Cummins amendment discloses the purpose to have been quite apart from the question of origin *versus*

destination value. The Carmack amendment had been construed to uproot, as to interstate commerce, State common law or statutes which forbade limitation of recovery "to a certain sum which may be named in the bill of lading": (Senator Cummins in charge of the bill,—51 Cong. Rec. 9621; See also Senate Report 407, 62nd Congress 2nd Session Calendar No. 346). And the Cummins amendment was intended "to restore to the shippers of this country not all, but a measure, of the rights which they possessed and which they exercised prior to the passage of the Carmack amendment"; same reference. "These statements of the author of the Act cannot * * * control its construction * * * but they * * * serve to indicate the probable intention of Congress in the passage of the Act"; Jennison *vs.* Kirk, 98 U. S. 453.

So this is all Congress was doing as to value—forbidding the naming of an arbitrary sum certain, unrelated to value. Congress intended to restore the same legal status as before—a status which recognized the validity of a provision to agree upon origin as the settlement value.

FOURTH POINT

Even if the Commission's order was not *ultra vires*, nevertheless, as the bill of lading contracts prescribed are not severable, the injunction was properly granted because of illegality of the Commission's order in various particulars.

The Commission has itself recognized and defined in its opinion in the case at bar the limits of its powers (52 I. C. C. at p. 685):

> "Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the carriers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act."

Also as to a matter upon which the Commission has administrative authority this can only be exercised upon evidence and after hearing: The Fairchild Case, 224 U. S. 510: The Florida East Coast Case, 234 U. S. 167. "The mere declaration of a commission is not conclusive": G. N. Ry. *vs.* Minnesota, 238 U. S. 340. So the assertions in the Commission's answer (Tr., pp. 95-96)

that the findings were based on evidence will not prevail against the statements in the Commission's report (exhibited with the bill and also with the answer) to the effect that there is no evidence. The Commission's brief (page 24) refers to the denial of "each allegation in the petition that there was no evidence to support the findings and order and alleges affirmatively that there was evidence to support the same," but this is, as this court has said, the mere declaration of a commission which is not conclusive. The declaration is a conclusion of law which is valueless standing alone: and, in any event, cannot be given effect as against the Commission's own statements in the exhibited report of the Commission to the effect that these matters were "not in issue" or equivalent phrases.

Moreover, this court has approved as a "most commendable practice" the omission from the record of the hundreds of pages of testimony before the Commission, and reliance on the Commission's own findings of fact. (L. & N. R. Co. *vs.* U. S., 238 U. S. 1, 10.) By virtue of this practice the court is "in a position to consider the sharp cut issue as to whether, as a matter of law, the Commission's findings of fact sustain its order" (*ibid,* p. 11). In the case at bar the Commission in its Official Report stated that there was no evidence on certain points: (Tr. pp. 43, 45).

The Commission's order was properly enjoined because:—

A. Without evidence and in excess of liability imposed by the law the Commission erred in forcing the carrier to assume liability during free time and after delivery on private siding.

(*Assignment of Errors VI* (c).)

The domestic and export bills of lading ordered by the Commission will require the carriers to assume carrier liability during free time instead of until 48 hours after notice of arrival and placement. The Commission's order in respect of this feature of the bill of lading is without supporting evidence and would add liability in excess of that imposed by law. The controlling considerations in determining the length of free time are various but all relate to the matter of returning the equipment into the public service. Free time is the *maximum* time after which the consignee, is in respect of the service due to the whole public, a wrongdoer, penalized by the demurrage charges to require him to discharge the lading. Free time is merely the utmost limit of time for discharge of the car. The discharge should be and usually is accomplished in less than free time.

The lapse of a reasonable time for the removal of goods determines the time of change from carrier to warehouseman.

The Commission's order also strikes from the domestic and export bills of lading the provision which terminates liability when shipments are delivered or received on private or other sidings after the cars have been detached from or attached to trains.

The considerations which the Commission presented for these alterations in the carriers' bill of lading will be found in the Commission's report as printed in the Transcript at pages 35 to 45, and at pages 52 to 57. These considerations were of law, not of fact. And yet we find in the brief for the Commission at page 31 the assertion that "what is a reasonable time in a given case is a question of fact and not a question of law." We need only contrast with this argument the conclusive statement of the Commission itself in its report (52 I. C. C. at page 703) found in the transcript at page 43, as follows:

> "No substantial evidence was introduced by the parties bearing upon this issue."

It is a question of law under the decided cases to determine a reasonable time for the continuance of the carriers' liability: The Titania, 131 Fed. 229 (C. C. A., 2nd Circ.).

B. The Commission erred in eliminating the Strikes and Riots clause.

(*Assignment of Error VI* (c).)

Although the Commission stated that the clause in existing bills which relieves the carrier from loss, damage or delay on account of strikes or riots "is not brought in issue" (52 I. C. C. 705), that is, was not the subject of evidence and controversy, nevertheless the Commission strikes out this clause *as to loss and damage* from the domestic bill, leaving the clause effective only as to *delay*. The clause (Section 1 of the Commission's export bill, Transcript page 84) providing that the carrier shall not be liable for loss, damage or delay resulting "from riots or strikes" was retained by the Commission in the inland part of its prescibed export bill of lading, without doubt upon the theory that the clause was unassailable from the angle of reasonableness in the export bill, which is unaffected by the Cummins Amendments. The Carmack-Cummins Amendments did not forbid contracting out of liability unless "caused by" the carrier. The clause which would be struck from the bills by the Commission's order does not relieve the carrier of liability from any loss or damage which the carrier causes.

The Commission's brief (pages 27-28) cites Railway *vs.* Wallace, 223 U. S. 481, and Railroad

vs. Collins, 249 U. S. 186. These cases dealt only with the question of burden of proof—a question of general law—in a suit against the initial carrier upon the Carmack-Cummins amendments. The question resolved against the carrier in the Wallace case was thus stated by the court:

> "The Company denied liability on the ground that under the contract expressed in the bills of lading, it's obligation and liability ceased when it duly and safely delivered the goods to the next carrier."

Hence the conclusion drawn (page 28) in the brief for the Commission, that "the Cummins amendment * * * prohibits any restriction of common law liability by stipulation or agreement in the receipt or bill of lading," finds no support in the two decisions on burden of proof.

The common law made the carrier an insurer unless he had exempted himself by a lawful term of his contract. The exceptions to the insurer duty were the act of God or the public enemy. Then in addition there was as a part of the common law the right of the carrier to exempt himself by reasonable contract provisions from all non-negligent losses.

The Carmack amendment recognized this breadth of the common law and was therefore construed in a great group of cases by this court to permit these reasonable and lawful exemption

contracts. In the Harriman Case (227 U. S. 657) this court said of the Carmack amendment:

> "The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence."

The Cummins amendments continued the controlling phrase "caused by it or by any" connecting carrier and left the carriers still with the common law power to contract out. The inhibition in the Cummins amendment was the same as the Carmack amendment in forbidding the inital carrier to contract out of liability for loss caused by a connecting carrier. The Cummins amendments also forbade "any limitation of liability or limitation of recovery or representation or agreement *as to value*"—a prohibition aimed only at false or unfair agreements to limit recovery to a sum less than value in the bill of lading and not substantive in any other particular.

Strikes and riots clause not questioned before Commission.

The strikes and riots clause in the current bill of lading reads as follows:

> "Except in case of negligence of the carrier or party in possession (and the burden

to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage or delay * * * resulting * * * from riots or strikes."

It will be observed that no attempt is made to exempt the carrier from liability from strikes or riots in the case of negligence. This clause was approved by the Commission in the original Bill of Lading case wherein it recommended the so-called uniform bill of lading now generally in use (14 I. C. C. 346, 353). No change therein was proposed by the shippers in the subsequent proceedings by the Commission. (See appendix A to the opinion of the Commission, 52 I. C. C. 705, wherein shippers' and carriers' proposals are set out in parallel columns). The right of the carriers thus to exempt themselves from loss due to strikes and riots except in case of negligence was thus conceded by shippers' representatives before the Commission. Such right was not denied or even questioned by the Commission. On the contrary it approved the clause in question as lawful and reasonable in the preceding case and has approved its retention in the inland portion of the export bill of lading in the present case. (Section 1 of the Commission's export bill, transcript p. 84).

It is evident on the face of the report that the

Commission's action was based solely upon the view that exemption from liability for loss or damage due to strikes and riots, while valid at common law, was prohibited by the Cummins amendments. The Commission rightly construed the Cummins amendments as inapplicable to traffic to non-adjacent foreign countries and held that in considering the inland portion of export bills of lading issued on shipments handled under through bills of lading from interior points to non-adjacent foreign countries it was not bound by the provisions of that act. (Opinion pp. 726-729). Its action in striking the provision out of the domestic bill of lading and allowing it to stand in the inland portion of the export bill of lading can therefore be explained only upon the theory that the Commission was governed solely by its interpretation of the Cummins amendment. Under the export bill the inland carrier is relieved altogether from any loss or damage occurring after the property is delivered to the ocean carrier and the inland provisions of the bill reviewed by the Commission apply only to the liability of the inland carrier itself. There is therefore nothing which distinguishes the relation of the inland carrier to the export freight and its relation to domestic freight except the difference which is made by the applicability of the Cummins amendments to the latter and not to the

former. Any provision just and reasonable as to the one form of traffic is just and reasonable as to the other. Any provision unjust or unreasonable as to one of these two classes of traffic would likewise be unjust and unreasonable as to the other. The Commission does not expressly state the ground upon which it requires the elimination of this clause in the domestic bill. All there is in the opinion on this most important subject is embraced in the following paragraph:

> "Although the matter is not brought in issue, we are not satisfied with the carriers' claim of exemption, which is included in this clause, from loss, damage, or delay on account of strikes or riots. We are of the opinion and find that this provision should be amended so as to provide that carriers shall not be liable for 'delay caused by riots or strikes', as thus modified we think that the condition proposed by the carriers would be in accord with the law and just and reasonable."

While this paragraph standing alone might warrant the inference that the clause is condemned as being in itself unjust and unreasonable the Commission's action in authorizing its retention in the inland portion of the domestic bill, coupled with the distinction which it draws between the operation of the Cummins amendment upon the two classes of traffic involved, makes it clear that the Commission's action is predicated wholly

upon the view that the provision is not "in accord with the law." It is equally clear that the law to which the Commission refers is the Cummins amendment and not the common law with which it is concededly in accord and the Commission's action was error.

Retention of the strikes and riots clause is of the utmost importance.

A discussion of the practical importance of the clause seems also appropriate. Strikes, especially those of large proportions, are frequently, if not generally, accompanied by violence and destruction of property, while it would be an infrequent and unusual case in which a riot would not be attended by such destruction. In the Debs strike 1000 freight cars belonging to the railway companies, some of which were loaded with interstate merchandise, were set on fire and destroyed. (U. S. *vs.* Debs, 64 Fed. 724, at p. 728). Railroad property and the contents of railroad cars are peculiarly subject to attack in times of strikes and riots, even when the rioting has no direct connection with railroad operation. The clause is particularly important during the reconstruction, post-war period. The conditions which were dealt with effectively by the courts in the case of In Re Debs (158 U. S. 564) were railroad and local to Chicago but are today nation-wide and are general industrial disturbances, such as the steel strike and the bitu-

minous coal strike. The coal strike has been apty characterized by competent governmental authority as a conspiracy in violation of the Lever Act and in disregard of existing agreements as to wages and working conditions. Violence and the consequent destruction of property by the familiar methods of marching coal miners, etc. have so far been held in check, but may develop at any time from such a dispute. Railroad cars and their lading could not escape. The losses which will follow ought not to be laid on the railroad alone. The clause is not only a matter of simply justice to the carriers under the circumstances, but is of great practical importance.

Shipper has option to secure full common law liability.

By paying the higher rate a shipper may secure the carriage of his goods at common law liability. It is but just and reasonable to permit the railroad company to exempt itself from liability from this cause in consideration of the lower rate charged. This the Commission recognizes in continuing the clause in the export bill. Furthermore to make the railroad company responsible in all cases for destruction or damage due to strikes and riots is an invitation to the lawless to destroy such property at the railroad's expense, particularly in that class of riots which are incited by misguided men with revolutionary

ideas working, through methods like sabotage, for a definite purpose.

C. The Commission erred in relieving the Consignor (contrary to law) of payment of freight money if, contrary to instructions, the carrier makes delivery without collecting.

(*Assignment of Error VI* (c).)

At the hearings the carriers were conditionally willing to consent to this provision in order to secure assent of the shippers to other conditions for which they contended. But these other conditions were denied to the carriers.

Liability of the consignor to pay freight is beyond dispute. One at whose request a service is rendered must pay: Elgin *vs.* U. S., 253 Fed. 907 (C. C. A.) at page 911. The carrier's right to collect is absolute and arises out of the relationship as guarded and enforced by the tariff provisions of the Commerce Act, and is not referable to the Commission's will or within the administrative field of "reasonableness."

FIFTH POINT

The injunction was not broader than the relief prayed. The Commission's order was not severable and was rightly enjoined as a whole.

The motions to dismiss were properly overruled.

(*Assignment of Errors V, VII, X and XI.*)

The District Court Jurisdiction Act (38 Stat. at L. 219, 22 October, 1913) authorizes an injunction suspending "in whole or in part, any order made or entered by the Interstate Commerce Commission." The Bills ordered by the Commission are entire contracts of interrelated covenants. An injunction should not be granted to restrain the Commission's order (even if the Commission has power to prescribe the contract) in regard to certain of the covenants only—the water line clauses for instance,—because that would be altering the Commission's contract, and thus an exercise of the Commission's administrative function by the court.

From this angle the case at bar is like the Nashville Terminal Case (242 U. S. 60) where this Court directed an injunction to issue against the whole of an order of the Commission though in part the order was not illegal.

The case at bar, in respect of the bill and injunction order, conforms to those which had the

approval of the courts in the Tank Car Case (242 U. S. 208). And as to the breadth of the prayer as compared with the injunction we are content to point out that the bill was filed by Railroad Companies and Water Lines, (all served with the Commission's order) on behalf of themselves and all other similarly situated carriers, and the relief by injunction was of the same scope.

As to the right of the parties plaintiff to immediate injunctive relief the District Court stated the controlling considerations thus (Tr., p. 112):

> "It is said that the petitioners, except the five water carriers above mentioned, are unaffected by the order because now in the actual control of the Director General of Railways. This control is expected to cease within the current year, and they will be subject to the order the moment their properties are returned to them whether the Director General complies with the order or not. If it was right to subject them presently to the order it is right that they should be allowed presently to dispute it, and we think there can be no doubt that the water carriers who can only escape from the order by withdrawing from joint arrangements with the land carriers and making entirely new dispositions and all the carriers who will be bound by it when their properties are returned to them will be subjected to damage irreparable within the meaning of the law."

LAST POINT.

It is respectfully submitted that the order of the District Court granting the injunction should be affirmed with costs.

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THADDEUS H. SWANK,
F. H. WOOD,
Of Counsel.

DECEMBER, 1919.

No. 541.

OCTOBER TERM, 1919.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants,

vs.

ALASKA STEAMSHIP COMPANY ET ALS., Appellees.

APPENDIX TO BRIEF FOR CARRIERS (APPELLEES).

SHOWING CHANGES MADE IN THE CARRIERS' BILL OF LADING BY THE ORDER OF THE COMMISSION.

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Counsel for Appellees.

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BLEWETT LEE,
THADDEUS H. SWANK,
F. H. WOOD,
Of Counsel.

DECEMBER, 1919.

THE case is stated in the opinion.

The Solicitor General and *Mr. Charles W. Needham*, with whom *Mr. P. J. Farrell* was on the briefs, for appellants.

Mr. Roscoe H. Hupper and *Mr. Theodore W. Reath*, with whom *Mr. Edgar H. Boles*, *Mr. George F. Brownell*, *Mr. Blewett Lee*, *Mr. Thaddeus H. Swank* and *Mr. F. H. Wood* were on the briefs, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

A petition was filed in the United States District Court for the Southern District of New York by numerous interstate carriers and carriers by water against the United States and the Interstate Commerce Commission to set aside an order of the Interstate Commerce Commission dated March 14, 1919, requiring the carriers to use two certain modified bills of lading, one pertaining to domestic and the other to export transportation. The cause came on for hearing upon application for a temporary injunction and upon a motion to dismiss the petition. The hearing was had before three judges, a Circuit Judge and two District Judges. A majority concurred in holding that the Interstate Commerce Commission had no authority to prescribe the terms of carriers' bills of lading, and that in any event there was no power to prescribe an inland bill of lading depriving the carriers of the benefits of certain statutes of the United States limiting the liability of vessel-owners. (259 Fed. Rep. 713.) One of the District Judges dissented, holding that the Commission had the power to prescribe bills of lading, and that the particular bills of lading in question were within the authority of the Commission. An order was entered refusing to dismiss the petition, and an injunction *pendente lite* was granted. From this order an appeal was taken directly to this court under the statute of 1913. (38 Stat. 220.)

It appears that the matters in controversy as to the authority of the Commission and the character of the bills of lading were subjects of much inquiry before the Commission, where hearings were had, and an elaborate report upon the proposed changes in carriers' bills of lading resulted in the adoption by the Commission of the two bills of lading. 52 I. C. C. 671.

Pending this appeal Congress passed on February 28, 1920, the act known as the "Transportation Act of 1920," which terminated the federal control of railroads, and amended in various particulars previous acts to regulate interstate commerce. In view of this act of Congress this court on March 22, 1920, entered an order requesting counsel to file briefs concerning the effect of the act upon this cause. Briefs have been filed, and we now come to consider the altered situation arising from the new legislation, and what effect should be given to it in the disposition of this case.

The thing sought to be accomplished by the prosecution of this suit was an annulment of the order of the Commission, and an injunction restraining the putting into effect and operation of such order, which prescribed the two forms of bills of lading. The temporary injunction granted was against putting into effect the Commission's order prescribing the forms of the bills of lading.

The Transportation Act of 1920, passed pending this appeal, makes it evident (and it is in fact conceded in the brief filed by appellants) that changes will be required in both forms of bills of lading in order that they may conform to the requirements of the statute. We need not now discuss the details of these changes. It is sufficient to say that the act requires them as to both classes of bills. We are of opinion that the necessary effect of the enactment of this statute is to make the cause a moot one. In the appellants' brief it is insisted that the power of the Commission to prescribe bills of lading is still existent,

and has not been modified by the provisions of the new law. But that is only one of the questions in the case. It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314; *United States* v. *Hamburg-American Line*, 239 U. S. 466, 475, 476, and previous cases of this court therein cited.

In the present case what we have said makes it apparent that the complainants do not now need an injunction to prevent the Commission from putting in force bills of lading in the form prescribed. The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation, having that effect, renders the case moot. *Berry* v. *Davis*, 242 U. S. 468.

In our view the proper course is to reverse the order, and remand the cause to the court below with directions to dismiss the petition, without costs to either party, and without prejudice to the right of the complainants to assail in the future any order of the Commission prescrib-

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* ALASKA STEAMSHIP COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 541. Argued December 16, 17, 1919.—Decided May 17, 1920.

This court will determine only matters actually in controversy essential to the decision of the particular case before it. P. 115.

In a suit in which the Interstate Commerce Commission was temporarily enjoined from requiring interstate and water carriers to use certain forms of bills of lading in domestic and export transportation, upon the ground that the Commission lacked power to prescribe them, *held*, that, since the Transportation Act of Feby. 28, 1920, passed pending the interlocutory appeal, contained provisions which would necessitate changes in both forms of bills, the case had become moot, and the court could not pass upon the Commission's authority, but would reverse the order of injunction, no longer needed to protect the complainants against the order of the Commission involved in the suit, without prejudice to the right to assail any such order adopted after the new legislation, and without costs to either party. *Id.*

259 Fed. Rep. 713, reversed.